Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ARTISTIC ENTERTAINMENT, INC, et al.,

Petitioners,

v.

CITY OF WARNER ROBINS, GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the federal judiciary declares a law facially invalid, does any portion of that law remain valid for purposes of suppressing free speech?

2. In a First Amendment case, can the district court *sua sponte* grant summary judgment against proposed, supplemental claims without first providing notice to the party proposing these claims?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Artistic Entertainment, Inc., a Georgia Corporation d/b/a Teasers and Stephen R. Dewberry (Petitioners) and Philip Campbell, City of Warner Robins, Georgia, Grady Clemonts, Dean Cowart, Charles Holt, Terry Horton, Jimmy Selph, and Donald Walker (Respondents).

CORPORATE DISCLOSURE STATEMENT

There are no parent corporation or publically held companies owing 10% or more of the stock of the corporate petitioner.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Artistic Entertainment, Inc. and Stephen R. Dewberry respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 331 F.3d 1196, and it is reprinted in the Appendix to this Petition at pages 1-19. The District Court's order is not published and is reprinted in the Appendix at pages 20-35. Also relevant to analyzing the questions presented by this Petition is the District Court's initial order granting a preliminary injunction. That unpublished decision is reprinted in the Appendix at pages 36-57.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on May 28, 2003. App. at 1. From that judgment, Petitioners timely filed a petition seeking both rehearing and rehearing *en banc*. On October 29, 2003, the Court of Appeals filed an order denying both the petition for rehearing and the petition for rehearing *en banc*. *See* App. at 58-9. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment I, Free Speech Clause.

ORDINANCE INVOLVED

City of Warner Robins Ordinance No. 57-00 provides as follows:

AN ORDINANCE TO AMEND THE ORDINANCE REGULATING ADULT BUSINESSES

WHEREAS, the Warner Robins City Council previously has conducted an inquiry into the adverse secondary effects of adult entertainment establishments on the communities in which such establishments operate, which inquiry included the effects of adult entertainment in connection with the sale and consumption of alcoholic beverages; and

WHEREAS, as a result of this inquiry the City Council previously has determined that adult entertainment in connection with the sale or consumption of alcoholic beverages has or may have serious adverse effects on the surrounding community, including an increase in certain types of criminal activity and a decrease in property values, and the City council on March 3, 1997, enacted Ordinance No. 18-97, entitled "Ordinance Regulating Adult Businesses," and on the same date adopted Ordinance No. 19-97 which amended the City's Alcoholic Beverage Ordinance in order to address these serious adverse effects; and

WHEREAS, the nature of the City Council's inequity and findings resulting therefrom are more fully described in Section 1.005 of Warner Robins' Ordinance Regulating Adult Businesses, which findings and public purpose are expressly reaffirmed and readopted as set out herein; and

WHEREAS, the City Council's findings are consistent with the Eleventh Circuit's decision and findings in *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 997 (11th Cir. 1998), and other case law in the Eleventh Circuit, as well as the wisdom and common sense of the Council members; and

WHEREAS, the United States Court of Appeals for the Eleventh Circuit has held that Ordinance No. 18-97 satisfies the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367 (1968), and is not unconstitutionally vague, but that Ordinance No. 18-97 imposes an unconstitutional prior restraint because it does not guaranty an adult business owner the right to begin expressive activities within a brief, fixed time frame; and

WHEREAS, the City desires to correct this constitutional infirmity and to otherwise amend Ordinance No. 18-97.

NOW, THEREFORE, BE IT ENACTED THAT:

1.

Ordinance No. 18-97 is amended by readopting the ordinance in its entirety with the following exceptions:

(a) Section 1.045 is deleted and reserved for future use.

(b) Section 1.050(a)(4) is deleted in its entirety and replaced by the following language:

"The names, residence addresses, social security numbers and dates of birth of all general partners, if the applicant is a partnership; and if the applicant is a corporation or a limited liability company, the same information for each corporate officer and director."

(c) Section 1.050(a)(5) is deleted in its entirety and replaced by the following language:

"A statement from the applicant whether the applicant, or any general partner, or corporate officer or director, in previously operating in this or another city, county or state, has had an adult business license or permit of any type revoked or suspended, and if so, the reason for the suspension or revocation and the business activity subjected to the suspension or revocation."

(d) Section 1.070(a)(3) is deleted in its entirety.

(e) Section 1.060(b) is amended by adding the following language:

"If the City Council has not approved or disapproved an application for a license within forty-five (45) days from the date such application was received by the City Clerk, then on the expiration of the forty-fifth (45th) day: (1) the application shall be approved and the City Clerk shall immediately issue the license for which application was made, and (2) the applicant shall have the right to begin operating in the manner allowed by the license for which application was made."

2.

If any ordinance or part thereof, of the City of Warner Robins is in conflict herewith, this ordinance shall have preference. If any provisions of this ordinance are held invalid, such invalidity shall not affect any of the other provisions which can be given effect with the invalid provision, and, to this end, the provisions of this ordinance are declared to be severable.

ENACTED AND EFFECTIVE THIS 5TH DAY OF SEPTEMBER, 2000.

Donald S. Walker, Mayor

STATEMENT OF THE CASE

In 1997, the City of Warner Robins ("the City") adopted two ordinances aimed at regulating "adult business" facilities. The first ordinance (Ordinance 18-97) established a comprehensive licensing scheme for operation of an adult business within city limits and, among other things, prohibited the sale and consumption of alcoholic beverages on the premises of an adult business ("the Adult Ordinance"). The second ordinance (Ordinance 19-97) amended the City's alcohol licensing laws to prohibit the selling, serving, or dispensation of alcoholic beverages by any "adult business" ("the Alcohol Ordinance"). The City Council approved these "belt and suspenders" ordinances after a hearing in which council members had an opportunity to review evidence of so-called secondary effects of adult entertainment. As Petitioners (collectively "Artistic") owned and operated an establishment which had been selling alcohol and offering

nude dancing in the City for nearly 10 years, they brought this action for injunctive relief and damages to challenge the Ordinances on constitutional grounds.

In February 1998, the District Court granted Artistic's motion for a preliminary injunction. App. at 36-57. Enjoining enforcement of the Ordinances, the court recognized that the City "need not conduct its own studies in order to determine whether the harm to be protected against in fact exists," App. at 52, but found that the City's out-of-state zoning studies did not provide a reasonable basis for believing that the Ordinances would "translate into solutions for the City of Warner Robins, particularly where the 'problem' in Warner Robins is one adult entertainment nightclub. . . . " *Id.* "More significantly," the court found, was that "very little of the material presented in these studies actually addresse[d] the effects of alcohol consumption and adult entertainment. . . . " The court went on to note that:

> Contrasted with the results of these studies from other cities, however, is the testimony of the Warner Robins City Council members, many of whom denied any knowledge of any particular crime problems at Teasers. One City Council member acknowledged that he was not so much concerned with crime in the area of Teasers as he was concerned with satisfying the general public by getting Teasers closed down. Furthermore, in testimony given after the City Council voted on the Ordinances, Warner Robins police officers testified that they were not aware of any particularized problems with drugs or prostitution in the area of Teasers.

App. at 53-4 (internal citations omitted).

The City appealed the injunction order. The Court of Appeals vacated the District Court's order enjoining the implementation of the ordinances, summarily finding that the lower court had not accorded sufficient weight to the evidentiary basis that supported adoption of the ordinances. *Artistic Entm't, Inc. v. City of Warner Robins*, 157 F.3d 907 (11th Cir. Aug 20, 1998) (Table No. 98-8361).

On remand, the City moved for summary judgment, and the parties submitted conflicting evidence regarding the accuracy, methodology, and relevancy of the "studies" supporting the Ordinances. The District Court granted the City's motion for summary judgment on all claims. Artistic appealed.

In the second appeal, the Court of Appeals concluded the Adult Ordinance and the Alcohol Ordinance were content-neutral and subject to the intermediate level of scrutiny established by *United States v. O'Brien*, 391 U.S. 367 (1968). *Artistic Entm't, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1308-9 (11th Cir. 2000). It also found the City had a reasonable basis for concluding that banning sale and consumption of alcohol at adult businesses would reduce the crime and other social costs associated with those businesses. Finally, though the Court concluded that the Adult Ordinance was not unconstitutionally vague, it held that the ordinance did operate as an unconstitutional prior restraint on expression because it failed to provide a right to operate if the City failed to act on an application. *Id.* at 1310-11; *see also* App. at 12-3.

After learning that the Adult Ordinance was facially unconstitutional, the City chose to draft an "amendment" to it, Ordinance 57-00 ("the Amending Ordinance"). Pet. at 2-5. The Amending Ordinance did not contain *any* of the

substantive or procedural licensing provisions scattered throughout the 22 pages comprising the Adult Ordinance. Instead it was a two-page document which read simply: [the Adult Ordinance] is amended by *readopting* the ordinance in its entirety with the following exceptions. . . . " *Id.* at 3 (emphasis added). Artistic only learned of the Amending Ordinance a few hours before the City Council was scheduled to vote on it. That night, on September 5, 2000, over the continuing objection of Artistic, the vote carried and the Amending Ordinance was adopted by the City as law.

The District Court later determined that Artistic was not entitled to damages for the 11 months spanning 1999 and 2000 during which the City forced Artistic to choose between nude dancing and alcoholic beverages. Agreeing with Artistic that the Adult Ordinance was unenforceable in its entirety, but concluding the Alcohol Ordinance was legitimately enforced, the district court invited the parties to file motions "related to the issue of whether the prior restraint problems with the Adult Ordinance ha[d] been cured" by the adoption of the Amending Ordinance.

The parties went in opposite directions. On the one hand, the City filed a motion for summary judgment seeking a ruling that the Amending Ordinance either cured or mooted Artistic's original claims. Artistic, on the other hand, filed motions to reopen discovery and supplement its complaint, raising several fact-sensitive challenges to the Amending Ordinance. The court granted Artistic's motion to file an amended complaint but, determining that the Amending Ordinance was in fact valid, simultaneously granted the City's motion for summary judgment. In other words, the District Court granted *sua sponte* summary judgment on proposed, supplemented

claims to an ordinance which was not the subject of Artistic's original complaint. The Court of Appeals affirmed this unprecedented order.

Not only did the Court of Appeals uphold an ordinance which was not challenged in the complaint, it upheld a content-based ordinance which, in its entirety, relied upon a void law.

Artistic asks this Court grant its petition for a writ of certiorari to conform the Court of Appeals decision to existing Supreme Court authority, to harmonize the Court of Appeals result with the decisional law of the Georgia Supreme Court and to correct a result that, if undisturbed, will lead to rampant disregard by state and local governments of rights protected by the First Amendment.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Over 100 years ago, this Court held that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). Without this tenet of constitutional law, it would hardly be possible for a written constitution to retain its paramount status. Yet this fundamental principle was cast aside by the Court of Appeals when it allowed the City to resuscitate a law "facially violative of the First Amendment." *Artistic Entm't* 223 F.3d at 1311. Borrowing a concept from contract law,

the court essentially treated the "unconstitutional" Adult Ordinance as *voidable* – as opposed to *void* – and allowed the City to revive it. The seriousness of this error is, of course, only exacerbated given that prior restraints are "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). As urged below, because a law repugnant to the Constitution is void *ab initio*, this Court must reverse the judgment of the Court of Appeals to preserve its constitutional jurisprudence.

1. A facially unconstitutional law is invalid in all its applications.

The meltdown began on August 23, 2000, when the Court of Appeals held the Adult Ordinance imposed an impermissible prior restraint in violation of the First Amendment. At that point the City had two options: it could enact a brand-new, comprehensive licensing ordinance to regulate adult businesses; or it could abandon the regulation of adult businesses altogether. Leaving adult businesses to regulate themselves would certainly seed a political storm. Adopting a new licensing scheme, on the other hand, would provide Artistic with a fact-finding opportunity to challenge any evidentiary basis offered in support of the new content-based law. Neither of these options appealed to the City.

The City instead drafted the Amending Ordinance (Pet. at 2-5) and hurried it to the Mayor and City Council for a vote. Despite the City's best efforts to cloak the enactment as nothing more than a casual "amendment," the implications could not be more clear: the City adopted a void law.

The City's actions might have enjoyed acceptance before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) was decided. But ever since Justice Marshall wrote "It is emphatically the province and the duty of the judicial department to say what the law is," it has been understood that judges decide cases arising under Constitution, not executive or legislative officials. *Id.* at 177. To permit a city council to treat a law as though a federal judiciary had never struck it down

> would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.
>
> That it thus reduces to nothing what we have deemed the greatest improvement on political institutions – a written constitution – would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

Id. at 178.

When the City passed an ordinance which "re-adopt[ed]" the facially unconstitutional Adult Ordinance, it breathed life into dead law, one which the Court of Appeals had determined offended the Federal Constitution. Though there has been wide debate regarding which "remedies" for constitutional violations are constitutionally required, no court has seriously questioned the proposition that one cannot be sanctioned without the authority of a valid law. *See* Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1332-33 nn.62&63 (2000).

Indeed every statute must first be valid on its face in order to be enforced. *See City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring in part) (holding "[t]he ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications.") (emphasis in original). The City cannot rehabilitate a law which has been declared to violate the Constitution in all of its applications. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of the Constitution").

2. The government bears the burden of proving that its content-based law does not offend the First Amendment.

The "readopting" maneuver not only created an inherently vague law, it allowed both the District Court and Court of Appeals to short-circuit the fact-finding process demanded in First Amendment cases. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). In *Alameda Books*, this Court evaluated the standard for "determining whether an ordinance serves a substantial government interest under *Renton*." *Id.* at 433. The plurality described the burdens of proof and persuasion at summary judgment in this way:

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39.

Justice Kennedy concurred in the judgment, but wrote separately to voice his concern that "the plurality's application of *Renton* might constitute a subtle expansion, which I do not concur." *Id.* at 445. "The narrow question presented in this case," he wrote, "is actually two questions. First, what proposition does a city need to advance

in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition?" *Id.* at 449. "The rationale of the ordinance," he continues, "must be that it will suppress secondary effects – and not by suppressing speech." *Id.* at 449-50.

In 1997, the City proposed to reduce the so-called "secondary effects" associated with nude dancing in taverns by, in fact, banning nude dancing in taverns. To support its proposition, the City offered out-of-state zoning studies (from Garden Grove, California, for example) and anecdotal testimony from concerned persons (from a local pastor, for example). Artistic submitted evidence which made the inference appear unreasonable that nude dancing in taverns creates adverse secondary effects. *Compare id.* at 451; *Flanigan's Enters. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 294-95 (5th Cir. 2003) (*en banc*) (evidence did not support a reasonable belief that the ordinance serves a substantial governmental interest). The City did not rebut Artistic's evidence, except to provide the deposition testimony of the Garden Grove study's authors, who candidly disavowed any basis in their study for believing that nudity and alcohol generated adverse secondary effects.

Artistic was deprived of an opportunity to challenge the factual predicate supporting the Amending Ordinance in accordance with *Alameda Books*. The Court of Appeals erred by deferring to dicta (*see Artistic Entm't*, 223 F.3d at 1308-10, as the *O'Brien* discussion is not outcome determinative) rather than following Justice Kennedy's admonition to inquire of an unreasonable inference. As shown below, Artistic never had a meaningful opportunity to challenge the Amending Ordinance.

B. The Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings.

The Court of Appeals has distorted the summary judgment standard. As the Court observed, Rule 56's notice provision is "[n]ot an unimportant technicality, but a vital procedural safeguard" which ensures that litigants have an opportunity to "formulate and prepare their best opposition to an impending assault upon the continued viability of their claim or defense." App. at 6 (internal quotation marks and citation omitted) (emphasis added). After implicitly acknowledging Rule 56 contemplates pending claims, the court went on to distinguish cases involving "purely legal questions based on complete evidentiary records" (App. at 7) from those "involving factual disputes where the non-moving party has not been afforded an opportunity to develop the record." *Id.* (footnote omitted). It held that only cases falling in the former category are susceptible to *sua sponte* disposition on summary judgment. App. at 7-8.

The Court of Appeals forced the City's summary judgment motion into the former category (*i.e.*, one involving purely legal questions), even though numerous factual questions surround the Amending Ordinance's enactment and threatened enforcement. For example, Artistic moved for leave to challenge whether a factual predicate supported the Amending Ordinance.[1] In response to this proposed claim, the Court of Appeals stated, "We cannot

[1] In the motion for leave to supplement the complaint, Artistic also alleged that the Amending Ordinance leaves an insufficient number of sites for adult businesses to operate in Warner Robins.

say that in enacting the Amending Ordinance the City's reliance on its own evidentiary basis compiled in support of the Adult Ordinance, which we specifically found adequate, was 'unreasonable.'" App. at 16. In essence, the court reasoned that because the new ordinance was only a "slight adjustment" to the old one, reliance on evidentiary basis "A" was good enough; thus turning to evidentiary basis "B" was unnecessary. *Compare Riley v. Nat'l Federation of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("the First Amendment does not permit the State to sacrifice speech for efficiency").

The fallacy here is obvious. Determining whether evidence supports a content-based law is not a "purely legal question"; it is, at best, a mixed question of fact and law. Artistic asked for permission to make fact-sensitive challenges to the new ordinance. The District Court granted permission. Though granting Artistic's leave to supplement the complaint, the district court simultaneously granted *sua sponte* summary judgment on those supplemented claims. By affirming this judicial feat, the Court of Appeals construed material evidence most favorably for the City.

If *Alameda Books* takes lower courts one step forward in managing "secondary effects" litigation, this case takes the Eleventh Circuit three steps back.

C. The Court of Appeals has decided an important federal question in a way that conflicts with a decision of the Georgia Supreme Court.

It is a settled rule of Georgia law that an unconstitutional law is void from its enactment. *City of Atlanta v. Gower*, 216 Ga. 368 (1960); *Jamison v. City of Atlanta*, 225

Ga. 51 (1969); *cf. In the Interest of R.A.S.*, 249 Ga. 236 (1982).[2] The Georgia Supreme Court has held that, because the Georgia Constitution prohibits the legislature from enacting a void law in the first instance, subsequent legislation cannot cure the defect of the void law. *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 617 (1953) ("The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.") (quotation marks and citation omitted). Because Georgia law makes clear that the Amending Ordinance cannot incorporate language which "had never been passed," that ordinance is fatally defective.

For similar reasons, the Alcohol Ordinance is also invalid. The core prescriptions found in the Alcohol Ordinance are incorporated by reference from the void Adult Ordinance. By allowing the Adult Ordinance's invalid terms to remain operative, the Court of Appeals has, ironically, left the viability of the Adult Ordinance neither "certain" nor "readily available." *Compare* App. at 17 ("A legislature – for example, a city council – may look to an infinite variety of sources in crafting its law as long as

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[2] *See, e.g., Swanson v. Dolezal*, 114 Neb. 540, 208 N.W. 639 (1926); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); *City of Little Rock v. Cavin*, 238 Ark. 333, 381 S.W.2d 741 (1964); *Plebst v. Barnwell Drilling Co.*, 243 La. 874, 148 So.2d 584 (1963); *State ex rel. Miller v. O'Malley*, 342 Mo. 641, 117 S.W.2d 319 (1938); *Hillsborough County v. Temple Terrace Assets Co., Inc.*, 111 Fla. 368, 149 So. 473 (1933).

the referenced material is both certain and readily available."); *see, e.g.*, *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 11 P.3d 762, 800 (Wash. 2000) ("If, though, the new act is not complete but refers to a prior statute which is changed but not repealed by the new act, one is required to read both statutes before the full declaration of the legislative will on the subject can be ascertained. This causes the very obscurity and tendency to confuse which the constitutional provision seeks to prevent, hence violates the constitution.").

Finally, and perhaps most troubling, by sanctioning the City's effort to apply the Alcohol Ordinance *mutatis mutandis* to Artistic, the Court of Appeals has sent a clear message to state and local governments: Place your harshest restrictions on adult entertainment outside of the adult entertainment code, thus insulating them from prior restraint analysis. *Cf. Walker v. City of Birmingham*, 388 U.S. 307, 346 (1967) (Brennan, J., dissenting) ("Yet by some inscrutable legerdemain these constitutionally secured rights to challenge prior restraints invalid on their face are lost if the State takes the precaution to have some judge append his signature to an ex parte order which recites the words of the invalid statute. The State neatly insulates its legislation from challenge by mere incorporation of the identical stifling, overbroad, and vague restraints on exercise of the First Amendment freedoms into an even more vague and pervasive injunction obtained invisibly and upon a stage darkened lest it be open to scrutiny by those affected"). That is not in spirit with the First Amendment.

IV. CONCLUSION.

The City's Adult Ordinance is void *ab initio*. This means that both the Alcohol and Amending Ordinances find their core proscriptions from an ordinance that, as a matter of federal constitutional law, no longer exists. But even if the Amending Ordinance is still somehow viable, under *Alameda Books*, the City is not entitled to summary judgment because there is "evidence which casts doubt on the reasonableness of the City's conclusions that the Ordinances will further its interest in protecting the quality of urban life." App. at 55.

For the foregoing reasons, Petitioners pray for a writ of certiorari to issue to the Court of Appeals for the Eleventh Circuit. In the alternative, Petitioners pray that the Court vacate and remand this matter in accordance with the decision rendered in *Z.J. Gifts D-4, LLC v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), *cert. granted in part*, 72 U.S.L.W. 3266 (U.S. Oct. 14, 2003) (No. 02-1609).

Respectfully submitted,

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331 F.3d 1196

United States Court of Appeals, Eleventh Circuit.

ARTISTIC ENTERTAINMENT, INC., a Georgia Corporation d.b.a. Teasers, Stephen R. Dewberry, Plaintiffs-Appellants,

v.

CITY OF WARNER ROBINS, Donald Walker, Individually and in his capacity as mayor of the City of Warner Robins, et al., Defendants-Appellees.

NO. 02-10216.

May 28, 2003.

Steven M. Youngelson, Cary Stephen Wiggins, Cook, Youngelson & Wiggins, Atlanta, GA, for Plaintiffs-Appellants.

Charles E. Cox, Jr., Cole & Cox, LLP, Macon, GA, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before *EDMONDSON*, Chief Judge, *WILSON*, Circuit Judge, and NELSON*, District Judge.

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* Honorable Edwin L. Nelson, United States District Judge for the Northern District of Alabama, sitting by designation. This case is being decided by a quorum due to the death of Judge Nelson on 17 May 2003. *See* 28 U.S.C. § 46(d).

PER CURIAM:

In 1997 the City of Warner Robins, Georgia, adopted two ordinances aimed at prohibiting the consumption of alcoholic beverages at adult entertainment facilities. The first ordinance, Ordinance 18-97, titled "An Ordinance Regulating Adult Businesses" (the "Adult Ordinance"), among other things, established a licensing scheme for operation of an "adult business" within city limits and prohibited the sale and consumption of alcoholic beverages on the premises of an adult business.[1] The second ordinance, Ordinance 19-97, titled "An Ordinance to Amend the Warner Robins Alcoholic Beverage Ordinance" ("Alcohol Ordinance"), amended the City's alcohol licensing laws to prohibit the selling, serving, or dispensation of alcoholic beverages by any "adult business."[2] The City Council approved the ordinances after an evidentiary hearing in which council members had an opportunity to review studies and testimony of state officials regarding the combined effects of alcohol and adult entertainment.

The plaintiffs/appellants, who own and operate an adult entertainment establishment that sells alcohol and offers nude dancing in the City, brought this action to challenge both ordinances on constitutional grounds.

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[1] The Adult Ordinance also specified that adult businesses (1) could not be located within 1,000 ft. of a school, church, licensed child care center, public park, or property zoned or used for residential purposes; (2) could not be within 1,000 ft. of another location licensed as an Adult Business or an Alcohol Merchant; and (3) could not be located on less than one acre of land containing less than 100 ft. of road frontage. (1 R. at Tab 10, Ex. B.)

[2] 1 R. at Tab 10, Ex. C.

I. PROCEDURAL HISTORY

This is the third appeal in this litigation. Initially, this court vacated the district court's order enjoining the implementation of the ordinances, finding that it had not accorded sufficient weight to the evidentiary basis that supported adoption of the ordinances. In the second appeal, we concluded the Adult Ordinance and the Alcohol Ordinance were content-neutral and subject to the intermediate level of scrutiny established by *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and that the Warner Robins City Council had an adequate basis for concluding that a proscription on the sale and consumption of alcohol at adult businesses would reduce the crime and other social costs associated with those businesses. *Artistic Entm't, Inc. v. City of Warner Robins,* 223 F.3d 1306, 1308-10 (11th Cir.2000). We also concluded that the Adult Ordinance was not unconstitutionally vague, but that it did operate as an unconstitutional prior restraint on expression because it did not provide for an applicant's right to begin operating his business within a reasonable time if the City failed to act on his application as required by *Redner v. Dean,* 29 F.3d 1495 (11th Cir.1994). *Artistic Entm't,* 223 F.3d at 1310-11.

After remand, the City enacted Ordinance 57-00, entitled "An Ordinance to Amend the Ordinance Regulating Adult Businesses" ("Amending Ordinance").[3] The Amending Ordinance re-adopted the Adult Ordinance in all respects, but additionally provides in pertinent part:

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[3] 2 R. at Tab 72, Ex. B.

> If the City Council has not approved or disapproved an application for a license within forty-five (45) days from the date such application was received by the City Clerk, then on the expiration of the forty-fifth (45th) day: (1) the application shall be approved and the City Clerk shall immediately issue the license for which application was made, and (2) the applicant shall have the right to begin operating in the manner allowed by the license for which application was made.

In subsequent proceedings, the district court found Artistic was not entitled to damages for the period during which the City required it to refrain from offering alcoholic beverages in conjunction with nude dancing.[4] Agreeing with Artistic that the entire Adult Ordinance was unenforceable, but concluding the Alcohol Ordinance was legitimately enforced, the district court then invited the parties to file motions "related to the issue of whether the prior restraint problems with the Adult Ordinance have been cured" by the adoption of the Amending Ordinance.[5]

The City filed a motion for summary judgment arguing that the Amending Ordinance had cured the prior restraint problem. Artistic filed a motion to reopen discovery and a motion to amend its complaint, contending: the

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[4] The City initially agreed that neither ordinance would be enforced while the case was being litigated. However, on December 16, 1999, after the district court granted the City summary judgment on all counts, the City began enforcing the ordinances against Artistic until August 24, 2000, the day after we held that the Adult Ordinance operated as an unconstitutional prior restraint on expression. Since then Artistic has offered both alcoholic beverages and nude dancing.

[5] 2 R. at Tabs 65-68.

Amending Ordinance did not cure the prior restraint problem; new evidence would show the Amending Ordinance lacked any evidentiary basis as required by the United States and Georgia constitutions; and, the Amending Ordinance was not enacted in accordance with the notice and hearing procedures required by Georgia zoning laws.[6] In its response to the City's motion for summary judgment, Artistic reiterated its arguments that the Amending Ordinance failed to cure the prior restraint problem and violated the Georgia zoning laws.[7] Artistic invited the district court to consider the summary judgment facts and legal argument in conjunction with its motion to supplement, noting "the issues raised and argued in the motions overlap to a large degree."[8]

In the context of these pending motions, and after accepting evidence in support of Artistic's motion, the district court granted Artistic's motion to file an amended complaint[9] but, finding the Amending Ordinance was valid, also granted the City's motion for summary judgment on all claims. Finding that additional discovery would not be helpful, the district court denied Artistic's request to reopen discovery. This appeal followed.

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[6] R2 R. at Tab 72.

[7] 2 R. at Tab 74.

[8] 2 R. at Tab 78, p. 1.

[9] Artistic had argued that the validity of the Amending Ordinance was not properly before the court without an amendment to the pleadings. The City acquiesced to the amendment, but contended it was, nevertheless, entitled to summary judgment regarding the validity of the Amending Ordinance.

II. ISSUES

Artistic argues the district court granted summary judgment *sua sponte* on the supplemented claims, without providing notice or an opportunity for Artistic to come forward with evidence to show that the supplemented claims created a genuine issue of material fact. Artistic also argues the district court improperly denied its request to reopen discovery. Artistic further argues the Amending Ordinance is invalid because: (1) the unconstitutional portions of the Adult Ordinance were not severable, so that the entire Adult Ordinance was void, and could not be adopted by reference in the Amending Ordinance; (2) the adoption of the Amending Ordinance violated Georgia's Zoning Procedures Law; and (3) adoption of the Amending Ordinance violated the First Amendment because the City lacked a proper evidentiary basis to support its passage. Finally, Artistic argues the district court erred in holding the Alcohol Ordinance enforceable even though portions of it adopt by reference definitions contained in the void Adult Ordinance.

III. DISCUSSION

A. The Grant of Summary Judgment

We have previously emphasized that Rule 56's notice provision "is not an unimportant technicality, but a vital procedural safeguard. . . . [T]he notice provision ensures that litigants will have at least ten days in which to formulate and prepare their best opposition to an impending assault upon the continued viability of their claim or defense." *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1417 (11th Cir.1997) (citations omitted). We have, however, distinguished between *sua sponte* grants of summary

judgment in cases involving purely legal questions based on complete evidentiary records, and cases involving factual disputes where the non-moving party has not been afforded an adequate opportunity to develop the record.[10] For instance, in *Massey,* in reversing the district court's *sua sponte* grant of summary judgment, we distinguished *Black Warrior Electric Membership Corp. v. Mississippi Power Co.,* 413 F.2d 1221 (5th Cir.1969), emphasizing that *Black Warrior* involved a *sua sponte* grant of summary judgment on a purely legal issue, while the issue upon which the district court granted summary judgment in *Massey* involved a question of fact which the non-moving party had not been afforded an adequate opportunity to develop. *Massey,* 116 F.3d at 1418; *Black Warrior Electric,* 413 F.2d at 1226. Likewise, in *Burton v. City of Belle Glade,* 178 F.3d 1175 (11th Cir.1999), we made it clear that where a legal issue has been fully developed, and the evidentiary record is complete, summary judgment is

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[10] Other circuits reviewing *sua sponte* grants of summary judgment have been similarly concerned with the completeness of the evidentiary record before the trial court. In *Ramsey v. Coughlin,* 94 F.3d 71 (2nd Cir.1996), the court reversed a district court's grant of summary judgment *sua sponte* in favor of the defendant because "an orderly and reviewable record" did not exist. *Id.* at 74. However, the court made it clear that:

> Where it appears clearly upon the record that all of the evidentiary materials that a party might submit in response to a motion for summary judgment are before the court, a *sua sponte* grant of summary judgment against that party may be appropriate if those materials show no material dispute of fact exists and that the other party is entitled to judgment as a matter of law.

Id.

entirely appropriate even if no formal notice has been provided.[11] *Id.* at 1204.

In the instant case, we conclude that the district court's grant of summary judgment was proper. In doing so, we do not retreat from our previous admonition that summary judgment should be granted *sua sponte* only in those circumstances in which the dismissed claims have been fully developed in the evidentiary record and the non-moving party has received adequate notice. Here, the district court's April 16, 2001, order made it clear that both parties were expected to come forward with motions "related to" the constitutionality of the Adult Ordinance following the adoption of the Amending Ordinance.

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[11] Other circuits have similarly held that formal notice is not always required. *E.g. Bridgeway Corp. v. Citibank,* 201 F.3d 134, 140 (2nd Cir.2000) (holding that the district court properly granted a defendant summary judgment *sua sponte* even though the plaintiff had not been given any notice because "nothing in the record [indicated] that Bridgeway was procedurally prejudiced by the district court's failure to give notice that it was considering a *sua sponte* grant of summary judgment in favor of Citibank" on a legal issue); *Bramble v. Am. Postal Workers Union,* 135 F.3d 21, 27 (1st Cir.1998) (holding that lack of notice prior to a grant of summary judgment *sua sponte* does not warrant reversal where nonmovant's brief showed that he did have adequate notice of the legal theory used by the court to grant summary judgment); *see also Ross v. Univ. of Tex.,* 139 F.3d 521, 527 (5th Cir.1998) (holding that lack of notice before granting summary judgment *sua sponte* does not warrant reversal where it was clear that nonmovant's claim had no basis); *English v. Cowell,* 10 F.3d 434, 437 (7th Cir.1993) (noting that notice would not be required prior to granting summary judgment *sua sponte* where the nonmovant's claim is frivolous). *But see Lopez-Carrasquillo v. Rubianes,* 230 F.3d 409, 411-12 (1st Cir.2000) (holding that it was error for a district court to simultaneously permit the plaintiff to amend a complaint to reinstate previously dismissed defendants and grant those reinstated defendants summary judgment *sua sponte* on the added claims).

Furthermore, although the district court had no formal motion for summary judgment on the new claims before it, and did not formally notify Artistic that it was considering the new claims in the summary judgment proceedings, the merits of the claims were fully briefed and evidence was accepted and considered in conjunction with the simultaneous motion to amend. Under these circumstances, Artistic had sufficient notice that the court might rule on the supplemented claims. Furthermore, even if the district court had formally told Artistic that the new claims would be addressed in the summary judgment proceedings, we are convinced that the outcome would not have been different. As discussed below, the district court had all the information necessary to rule on the legal issues, and Artistic raised no genuine question of material fact that would have precluded summary judgment.

B. The Motion To Reopen Discovery

We review district court decisions concerning discovery only for an abuse of discretion. *Burger King Corp. v. Weaver,* 169 F.3d 1310, 1315 (11th Cir.1999). Generally, a motion for additional discovery is properly denied where a significant amount of discovery has already been obtained and further discovery would not be helpful. *Avirgan v. Hull,* 932 F.2d 1572, 1580-81 (11th Cir.1991). Artistic argues the district court erred by not granting its motion to reopen discovery because further discovery would show that the evidentiary basis on which the Amending Ordinance was passed was no longer reasonable, that the Amending Ordinance was adopted in violation of Georgia's Zoning Procedures Law, that the Amending Ordinance leaves an inadequate number of adult businesses to locate

within the City of Warner Robins, and that the Amending Ordinance uniquely and adversely affects Artistic.

The district court held further discovery would not be helpful primarily because all of these issues could have been addressed much earlier in the litigation. Because the Amending Ordinance merely readopted the same language concerning adult businesses contained in the original Adult Ordinance, Artistic could have challenged the zoning aspects of the Ordinance when the complaint was first filed in 1997. Moreover, the studies Artistic wished to introduce were provided to the City Council when the Amending Ordinance was adopted. Therefore, whether the council properly considered the studies is a question of law that further discovery would not resolve. Under these circumstances, the district court did not abuse its discretion in finding that further discovery would not be helpful.

C. The Validity of the Amending Ordinance

We review a district court's grant of summary judgment *de novo,* applying the same standard as the district court, and reviewing all facts and reasonable inferences in a light most favorable to the nonmoving party. *Allison v. McGhan Med. Corp.,* 184 F.3d 1300, 1306 (11th Cir.1999). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

When we last reviewed this matter, we decided the Adult Ordinance facially violated the First Amendment because it did not "guarantee the adult business owner the right to begin expressive activities within a brief, fixed time frame." *Artistic Entm't,* 223 F.3d at 1311. The Adult

Ordinance, as readopted by the Amending Ordinance, now requires the City to act on an application within 45 days and provides that if the City fails to act within that time frame, the application will be automatically approved, and "the applicant shall have the right to begin operating in the manner allowed by the license for which application was made." The additional language is consistent with our holding in *Redner v. Dean,* 29 F.3d 1495, 1500-01 (11th Cir.1994), where we decided that a time limit of 45 days in which the government must act on a similar license application avoided any prior restraint problem only if provision is made to allow, within a reasonable time, the applicant to engage in the activity for which license is sought even absent action on the license application.

Artistic argues this court's previous holding rendered the entire Adult Ordinance void, so that the City could not cure the Adult Ordinance through adoption of the Amending Ordinance. Rather, Artistic contends the City's only option was to enact a new ordinance, complying with Georgia's Zoning Procedures Law and conducting a new evidentiary hearing. On the other hand, the City argues that the presence of a severability clause in the Adult Ordinance[12] saved the portion of the Adult Ordinance that was re-adopted through the Amending Ordinance. The City also contends the Georgia Zoning Procedures Law is

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[12] The severability clause states "If any section, subsection, subdivision, paragraph, sentence, clause or phrase in this ordinance . . . is for any reason held to be unconstitutional or invalid or ineffective . . . such decision shall not affect the validity or effectiveness of the remaining portions of this ordinance." (1 R. at Tab 10, Ex. B, § 1.170).

inapplicable to the ordinances at issue, and that a new evidentiary hearing was not required.

1. The Severability of the Adult Ordinance

We apply Georgia law to determine what portion of a Georgia statute, if any, survives due to a severability clause, when a portion of that statute is judicially invalidated. *See Smith v. Butterworth,* 866 F.2d 1318 (11th Cir.1989) (applying Florida law to determine the effect of a severability clause in a Florida statute). In *Chambers v. Peach County,* 268 Ga. 672, 492 S.E.2d 191, 193 (1997), the Georgia Supreme Court held that a severability clause in an unconstitutional county ordinance created "a presumption that the county intended for invalid provisions not mutually dependent on other provisions to be severed, leaving the remainder of the ordinance intact." We must not, however, "give to the statute an effect altogether different from that sought by it when considered as a whole." *City Council of Augusta v. Mangelly,* 243 Ga. 358, 254 S.E.2d 315, 320 (1979) (Hill, J., dissenting) (superseded by statute as noted in *Nielubowicz v. Chatham County,* 252 Ga. 330, 312 S.E.2d 802, 803 n. 1 (1984)). Accordingly, under Georgia law, we must determine whether the invalid provisions of the Adult Ordinance are mutually dependent upon any other portions of the Adult Ordinance, while at the same time preserving the original purpose of the ordinance.

An examination of the Adult Ordinance reveals that the entire ordinance is designed to regulate adult businesses through a licensing regime. The ordinance's substantive requirements are closely intertwined with the licensing procedure and the two cannot be separated

without disrupting the obvious purpose of the ordinance. Therefore, although the Adult Ordinance contains a severability clause, we conclude that no part of the Adult Ordinance survived our decision in *Artistic Entertainment,* because the entire ordinance is dependent upon a valid licensing regime.

Because no part of the Adult Ordinance survived our previous decision, the Amending Ordinance is valid only if it stands as an entirely "new" ordinance. Artistic argues that the Amending Ordinance is not a valid "new" ordinance because it was not enacted in accordance with Georgia's Zoning Procedures Law and violates the procedural requirements of the First Amendment.

2. Georgia's Zoning Procedures Law

Artistic argues the Amending Ordinance constitutes a zoning ordinance requiring a proper hearing pursuant to the Georgia Zoning Procedures Law. Georgia's Zoning Procedures Law requires a local government to hold hearings when it proposes to take action that will result in a "zoning decision." Ga.Code Ann. § 36-66-4 (2000). The Georgia Supreme Court has said the requirements of the Zoning Procedures Law apply to the entire process of enacting or amending a zoning ordinance. *Little v. City of Lawrenceville,* 272 Ga. 340, 528 S.E.2d 515, 517 (2000).

However, not every ordinance regulating the use of land constitutes a zoning ordinance. For instance, in *Fairfax MK, Inc. v. City of Clarkston,* 274 Ga. 520, 555 S.E.2d 722 (2001), the court decided that a Gasoline Service Station Ordinance was not a "zoning ordinance" even though the ordinance required a minimum distance of 500 feet between a gas station and a school or other

place of public assembly. The court came to this conclusion because the definition of "zoning ordinance" under the Georgia Zoning Law[13] encompasses only "regulation of uses and development by means of zones or districts." *Id.* at 724. Furthermore, the court stated:

> The regulation of certain types of businesses due to their inherent character is not general and comprehensive like zoning. . . . The presence of lot size requirements or space restrictions does not transform a local licensing or regulatory ordinance into one governed by a zoning procedures statute where it is clear from a reading of the ordinance "as a whole that it is intended to regulate a particular occupation, rather than to regulate the general uses of land."

Id. (citations omitted). Under *Fairfax,* the Adult Ordinance is not a "zoning ordinance" even though it does place certain limitations on locations available to an adult business and establishes certain minimum lot sizes and road frontages. Rather than regulating "general uses of land," the Adult Ordinance regulates a particular type of activity – adult entertainment. As such, the Amending Ordinance, re-adopting the Adult Ordinance, is not a zoning ordinance and is not subject to the hearing requirements established under the Zoning Procedures Law, even if it was adopted as a "new" ordinance rather than as a true amendment.

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[13] Ga.Code Ann. § 36-66-3(5) defines "zoning ordinance" as "an ordinance or resolution of a local government establishing procedures and zones or districts within its respective territorial boundaries which regulate the uses and development standards of property within such zones or districts."

3. The First Amendment

Artistic also argues the Amending Ordinance fails as a new enactment because the City did not have a proper evidentiary basis for the ordinance as required by the First Amendment. We previously concluded that the Adult Ordinance was content neutral and subject to the *O'Brien* test. *Artistic Entm't,* 223 F.3d at 1308-09. Under *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), content neutral restrictions on speech are valid if the government can show a reasonable basis for believing its policy will indeed further a substantial government interest and that the policy is the least restriction possible which would further that interest. *See Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993 (11th Cir.1998). Previously, we decided that the City of Warner Robins, in enacting the original Adult Ordinance, "had an adequate basis for concluding that proscribing the sale and consumption of alcohol would reduce the crime and other social costs associated with adult businesses." *Artistic Entm't,* 223 F.3d at 1309. Therefore, the question before us is whether the City could rely on the original evidentiary support for the Adult Ordinance in adopting the Amending Ordinance.

In *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Supreme Court made it clear that it is entirely proper for a city to rely on the findings of other cities in creating legislation to combat the negative secondary effects associated with adult businesses. As long as "whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," such reliance is appropriate. *Id.* at 51-52. Here, the City adopted an ordinance almost identical to the original Adult Ordinance, making a slight adjustment

designed and intended to correct the prior restraint problem found by this court. We cannot say that in enacting the Amending Ordinance the City's reliance on its own evidentiary basis compiled in support of the Adult Ordinance, which we specifically found adequate, was "unreasonable."

D. The Alcohol Ordinance

We did not invalidate the Alcohol Ordinance in the previous appeal. But Artistic argues that the Alcohol Ordinance is so intertwined with the void Adult Ordinance, the Alcohol Ordinance should be struck down as unacceptably vague. The portion of the Alcohol Ordinance that prohibited the sale of alcoholic beverages at businesses "for which a license is required pursuant to Warner Robins' [Adult Ordinance]," became unenforceable when no valid Adult Ordinance existed. But, we reject – as did the district court – Artistic's contention that the City, pursuant to the amended Alcohol Ordinance, could not prohibit adult entertainment on the premises of establishments offering alcoholic beverages.

We look to Georgia law to determine whether the Alcohol Ordinance – divested of the licensing cross-reference – survived our decision invalidating the Adult Ordinance.[14] In *Union City Board of Zoning Appeals v.*

[14] A municipal ordinance is essentially a "local statute;" it is subject to the same rules that govern the construction of statutes. *See* 6 Eugene McQuillin, *The Law of Municipal Corporations* § 20.39 (3d ed.2002); *City of Atlanta v. Miller,* 256 Ga.App. 819, 569 S.E.2d 907, 908 (2002) ("Construction of an ordinance is a question of law, subject to the canons of statutory construction. . . .").

Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996), the Georgia Supreme Court stated, "When a statute cannot be sustained as a whole, the courts will uphold it in part when it is reasonably certain that to do so will correspond with the main purpose which the legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose." *Id.* at 884 (internal quotations and citation omitted). After striking the referenced licensing provisions, much remained of the amended Alcohol Ordinance that was consonant with the legislature's purpose, and enough remained to accomplish that purpose.

Artistic argues that the entire amended Alcohol Ordinance fails because portions of the Alcohol Ordinance adopt by reference certain definitions contained in the void Adult Ordinance. We disagree.

The Alcohol Ordinance incorporates by reference the definitions of "specified sexual activity" and "specified anatomical areas" contained in the Adult Ordinance. Incorporation by reference is a form of legislative shorthand; the effect of an incorporation by reference is the same as if the referenced material were set out verbatim in the referencing statute. A legislature – for example, a city council – may look to an infinite variety of sources to reference in crafting its law as long as the referenced material is both certain and readily available.

We are aware of no authority to the effect that a definition incorporated by reference into another otherwise valid ordinance (for example, the Alcohol Ordinance) ceases to be an operative definition just because it derives from a referenced ordinance (for example, the Adult Ordinance) that was declared unconstitutional for reasons

having nothing to do with the definition. For incorporation purposes, as long as the referenced definition is certain and is readily available, it is valid: that the ordinance referenced has lapsed or has been repealed or has been invalidated (for reasons unrelated to the definition) is not important. *See In re Heath,* 144 U.S. 92, 12 S.Ct. 615, 616, 36 L.Ed. 358 (1892) ("Prior acts may be incorporated in a subsequent one in terms or by relation, and when this is done the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication").

Georgia law rejects the wholesale invalidation urged by Artistic. In *Town of Douglasville v. Johns,* 62 Ga. 423, 427 (Ga.1879), the Georgia Supreme Court concluded that a legislative act granting a town charter was enforceable even though the charter incorporated by reference certain code sections declared to be unconstitutional:

> The legislature might have taken them [the referenced code provisions] from an English book or from a newspaper, and engrafted them on the charter; when it did so, it became the law to this town and all its citizens.

Absent clearly expressed legislative intent to the contrary, when a statute adopts by reference a definition in another statute, the adopted definition becomes a part of the adopting statute and is not affected by later amendment or repeal of the referenced act containing the definition. *See, Dismuke v. State,* 142 Ga.App. 381, 236 S.E.2d 12, 14 (1977) ("Does the deletion of the referenced statutes legally affect the existence or enforcement of the adoptive Act? We find that it does not.").

The provisions of the amended Alcohol Ordinance that regulated exposure of "specified anatomical areas" and prohibited "specified sexual activity" referenced the Adult Ordinance only for definition of the quoted terms; those definitions are certain, readily available, and their continued validity is in harmony with the intent of the legislature. The constitutional infirmity we found in the Adult Ordinance was unrelated to these referenced definitions. The Alcohol Ordinance remained valid and enforceable.[15]

AFFIRMED.

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[15] We note that section 4-38 of the Alcohol Ordinance as it existed before the challenged amendments, entitled "Adult Entertainment," already prohibited the sale of alcoholic beverages at any facility that permits public display of nudity. That earlier provision was seemingly not enforced. The amendment did not delete or replace expressly this provision. When, however, the amendment was codified, it, too, was codified as section 4-38. It may be that the unamended section 4-38 survived the amendment. Or it may be that, even if the amendment to the Alcohol Ordinance was invalidated, the pre-existing section would apply. Because we do not rely on the unamended ordinance, we need not resolve these questions. Suffice it to say that even without concluding that the amended Alcohol Ordinance survived our prior restraint decision, we doubt Artistic could prevail.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ARTISTIC ENTERTAINMENT, INC., A Georgia Corporatoin d/b/a **TEASERS**, and **STEPHEN R. DEWBERRY** Plaintiffs, v. **THE CITY OF WARNER ROBINS, DONALD WALKER,** Individually and in his capacity as Mayor of the City of Warner Robins, **CHARLES HOLT, TERRY HORTON, JIMMY SELPH, DEAN COWART, GRADY CLEMONTS**, and **PHILIP CAMPBELL**, all in their individual capacities as well as their capacities as Counselpersons for the City of Warner Robins, Defendants.	Civil Action No. 5:97-cv-195-4(HL)

ORDER

(Filed Jan. 2, 2002)

There are presently two motions before the Court: Motion for Summary Judgment of Defendant City of

Warner Robins[1] [Tab 69] and Plaintiffs' Motion for Leave of Court to File First Supplemented Complaint [Tab 71]. After consideration of the briefs, the Court hereby issues the following.

I. Background

In 1997, the City Council of Warner Robins adopted two ordinances: Number 18-97, An Ordinance Regulating Adult Businesses (the "Adult Ordinance") and Number 19-97, An Ordinance to Amend the Warner Robins Alcoholic Beverage Ordinance (the "Alcohol Ordinance"). The Adult Ordinance was adopted after the City Council conducted hearings and considered studies relating to the combined effects of alcoholic beverages and public nudity. The Ordinance is a comprehensive document detailing the licensing procedures for operating "adult businesses" within the City of Warner Robins. Included in the Adult Ordinance is a provision which prohibits persons in charge of adult businesses from permitting alcoholic beverages to be "brought upon, sold or consumed on the premises."

Also included within the Ordinance is a provision making certain persons ineligible for licensing if the premises for which license is sought fails to satisfy certain location prerequisites. According to the Ordinance, no license will issue if: (1) the premises for which license application has been made is located within 1,000 feet of

[1] In addition to the City, there are seven other Defendants in this case. However, those Defendants have not moved for summary judgment.

any school, church, licensed child care center, public park, or property zoned or used for residential purposes; (2) the premises for which application has been made is located within 1,000 feet of any other licensed adult business or alcohol-purveying establishment; or (3) the premises for which license application has been made is located on less than one acre of land and contains less than 100 feet of road frontage.

In adopting the Alcohol Ordinance, the City Council also relied on its study of the combined effects of alcohol and nudity and determined that it was in the best interests of the City to separate alcohol and adult entertainment. Therefore, the Alcohol Ordinance also prohibits adult businesses from selling, serving or dispensing alcoholic beverages on the premises. The Ordinance also prohibits the issuance of an alcohol license to any business located within 1,000 feet of any adult business.

After the Ordinances were adopted, the City informed Teasers that it intended to enforce them against it. In response, Teasers filed the lawsuit at issue here. Since its inception in 1997, the merits of Teasers' claims against the City have been thoroughly debated in this Court, initially on motion for injunctive relief, later on motion for summary judgment, and later still on motion for reconsideration. These issues have also been considered in the Court of Appeals. In its briefs in response to the motion for summary judgment and in support of its motion for reconsideration, Teasers' challenges to the Ordinances have focused on whether they constitute a content-based restriction on First Amendment rights and should be subjected to strict scrutiny; whether the City had a reasonable basis for its conclusions about the secondary effects of nudity and alcohol; whether the Ordinances were

unconstitutionally vague; and whether the Adult Ordinance operated as a prior restraint. The Court rejected each of these arguments and granted the City's Motion for Summary Judgment. The Eleventh Circuit reversed the decision of this Court, in part, however, and concluded that the Adult Ordinance operated as a prior restraint. *Artistic Entm't v. City of Warner Robins*, 223 F.3d 1306 (11th Cir. 2000).

In response to the decision of the Eleventh Circuit, on September 5, 2000, the City enacted Ordinance number 57-00, An Ordinance to Amend the Ordinance Regulating Adult Businesses (the "Amendment"), in which the City readopted Ordinance number 18-97 with certain exceptions. The Amendment attempts to cure the prior restraint problem identified by the Eleventh Circuit by adding the following language to the Adult Ordinance:

> If the City Council has not approved or disapproved an application for a license within forty-five (45) days from the date such application was received by the City Clerk, then on the expiration of the forty-fifth (45th) day: (1) the application shall be approved and the City Clerk shall immediately issue the license for which application was made, and (2) the applicant shall have the right to begin operating in the manner allowed by the license for which application was made.

(Def.'s Statement of Undisputed Matters of Material Fact, Ex. A at 2-3.) The City's Motion for Summary Judgment asks the Court to determine whether the September 5, 2000 Amendment does, in fact, cure the prior restraint violation.

The day after the City filed its Motion for Summary Judgment, Plaintiffs filed their Motion for Leave of Court

to File First Supplemented Complaint, in which they sought leave to supplement their complaint to add a challenge to the Amendment. In conjunction with their request to supplement, they seek leave of court to engage in discovery concerning the enactment of the Amendment. Plaintiffs contend discovery would show the Amendment was not enacted in accordance with the Zoning Procedure Act and that discovery would also show that enactment of the Amendment was arbitrary, capricious, and an act of censorship. Related to Plaintiffs' request to supplement the complaint and engage in discovery is their contention that the posture of this case does not permit the Court to rule on the issue of whether the Amendment cures the prior restraint because, absent an amendment to the pleadings, the Amendment is not properly before this Court. In order to get the matter before the Court for determination, the City does not oppose Plaintiffs' request for leave to supplement; however, the City does oppose further discovery on the matter, contending that the validity of the Amendment can be determined from the record. The City also opposes any attempt by Plaintiffs to revisit matters previously addressed by this Court.

II. Conclusions of Law

A. Plaintiffs' Motion for Leave of Court to File First Supplemented Complaint.

The question of whether to allow Plaintiffs to supplement the complaint to add a challenge to the Amendment is easily resolved: Plaintiffs desire to supplement; the City does not oppose it; and allowing the supplement would likely further judicial economy by allowing yet another aspect of the City's efforts to separate nude dancing and

alcohol to be decided in an ongoing proceeding. Thus, leave to supplement is granted.

The more difficult question concerns whether to allow Plaintiffs to engage in discovery. If, as Plaintiffs contend, discovery is necessary to establish their claims concerning the validity of the Amendment, then allowing them to supplement the complaint while disallowing discovery would render the supplement meaningless. On the other hand, if, as the City contends, the validity of the Amendment can be determined from the record already before the Court, then supplementing the complaint merely serves the necessary purpose of providing a vehicle for bringing the issue before the Court, and engaging in discovery would be unnecessary. This Court must determine, therefore, whether it appears that further discovery would be helpful in resolving the issues presented by the supplement to the complaint. *Avirgan v. Hull*, 932F.2d 1572, 1580 (11th Cir. 1991) (stating, "Where a significant amount of discovery has been obtained, and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied").

As the parties seeking to extend discovery, Plaintiffs have the burden of demonstrating that it is necessary to a proper resolution of their claim. In an effort to satisfy this burden Plaintiffs contend discovery would show that Ordinance 57-00 was not enacted in accordance with the Zoning Procedure Act and that the Ordinance leaves no sites available for adult businesses to locate within the City of Warner Robins. (Mem. Supp. Pls.' Mot. at 7-8.) Plaintiffs also contend that discovery would show that Teasers was uniquely and adversely affected by the Ordinance. (Mem. Supp. Pls.' Mot. at 8.)

The problem with Plaintiffs' contentions, however, is that these same issues could have been raised in this lawsuit when it was first initiated. Ordinance 57-00 merely readopted the same language concerning the zoning of adult businesses that was contained in Ordinance 18-97 when it was initially adopted. Thus, the right to challenge and pursue the Ordinance as an improper zoning enactment was available to Plaintiffs as early as 1997 and, therefore, it cannot be used as a basis for extending discovery at this late date.

In addition to their arguments that discovery would allow them to pursue the zoning aspects of Ordinance 57-00, Plaintiffs contend discovery "will prove that the enactment of Ordinance 57-00 was arbitrary, capricious, act of censorship, and therefore in violation of the Due Process Clause, the Equal Protection Clause, and the Free Speech Clause." (Mem. Supp. Pls.' Mot. at 13.) Plaintiffs also contend that discovery "would show that the basis upon which the City relied in enacting Ordinance 57-00 was not reasonable." (Mem. Supp. Pls.' Mot. at 14.) To support this contention Plaintiffs seek to introduce studies which, they contend, demonstrate "that adult entertainment establishments do not create undesirable secondary effects." (Mem. Supp. Pls.' Mot. at 13.)

With respect to this contention, however, Plaintiffs concede that they submitted these studies at the City Council meeting in which Ordinance 57-00 was adopted. (Mem. Supp. Pls.' Mot. at 13-14.) Thus, Plaintiffs have the studies and the City had the opportunity to review the studies and there is no discovery necessary as to them. The real issue with respect to the studies is a purely legal issue: Did the City improperly fail to consider the studies when adopting Ordinance 57-00? Therefore, the studies to

which Plaintiffs refer do not provide a basis for pursuing additional discovery in this case.

Plaintiffs have failed to persuade the Court that additional discovery is necessary in order for them to effectively challenge the validity of Ordinance 57-00. The Court finds that additional discovery would not be helpful in resolving the issues. Accordingly, Plaintiffs' motion to supplement the complaint to challenge Ordinance 57-00 is granted; Plaintiffs' request to pursue additional discovery is denied.

B. Defendant's Motion for Summary Judgment.

In its Motion for Summary Judgment, the City argues that the September 5, 2000 Amendment cures the prior restraint violation contained in the Adult Ordinance, as identified by the Eleventh Circuit. Plaintiffs take exception to the City's claim that the Amendment cures the prior restraint violation and also set forth various other infirmities which, they contend, invalidate the Amendment. Initially, Plaintiffs take issue with the manner in which the Amendment was enacted. They contend that Ordinance 57-00 was not enacted in accordance with Georgia's Zoning Procedures Law, O.C.G.A. §§ 36-66-1 to 36-66-5. Additionally, Plaintiffs contend that the Adult Ordinance was made a nullity by the Eleventh Circuit's decision in *Artistic Entertainment* and, therefore, it could not be "readopted" by the City. Furthermore, Plaintiffs argue that the evidentiary basis on which the City relied on enacting Ordinance 18-97 is no longer reasonable and, therefore, could not provide an evidentiary basis for adopting Ordinance 57-00. The Court finds none of these arguments to be persuasive.

1. Whether Ordinance 57-00 Violates Georgia's Zoning Procedures Law.

As its name suggests, the Zoning Procedures Law sets forth the procedures local governments must follow when regulating the uses of property through the exercise of their zoning powers. O.C.G.A. § 36-66-2(a) (2000). The Zoning Procedures Law requires a local government taking action resulting in a "zoning decision" to provide for a hearing on the proposed action and to provide public notice of the hearing. O.C.G.A. § 36-66-4(a)(2000). The Law defines "zoning decision" to mean "a final legislative action by a local government which results in: (A) The adoption of a zoning ordinance; [or] (B) The adoption of an amendment to a zoning ordinance which changes the text of the zoning ordinance."[2] O.C.G.A. § 36-66-3(4) (2000). The law further defines "zoning ordinance" to mean "an ordinance or resolution of a local government establishing procedures and zones or districts . . . which regulate the uses and development standards of property within such zones or districts." O.C.G.A. § 36-66-3(5) (2000).

In this case, the City provided the required notice and held the appropriate hearings prior to the enactment of Ordinance 18-97. Thus, to the extent that the restrictions contained in Ordinance 18-97 concerning the location of adult-licensed businesses were "zoning decisions," the Zoning Procedures Law was satisfied at the time of its enactment. Plaintiffs contend, however; that when the

[2] The definition of "zoning decision" includes other actions by local governments; however, none of those appear to be applicable here. *See* O.C.G.A. § 36-66-3(4)(C), (D), & (E) (2000).

City readopted Ordinance 18-97 in enacting Ordinance 57-00, the City was required by the Zoning Procedures Law to provide notice and conduct a hearing again, even though no changes were made to those portions of Ordinance 18-97 that constitute "zoning decisions." The Court does not agree with Plaintiffs' contentions in this regard and finds that the Zoning Procedures Law does not require that the city provide notice and a hearing under the circumstances at issue here.

In support of their position, Plaintiffs rely on *City of Cumming v. Realty Development Corp.*, 491 S.E. 2d 60 (Ga. 1997). The Court finds that decision to be distinguishable, however. In *City of Cumming*, the superior court found the City of Cumming's zoning decision to be unconstitutional and remanded the matter to the City for redetermination. The Supreme Court of Georgia held that, under those circumstances, the process had, in essence, begun anew and thus another hearing was required by the Zoning Procedures Law. In reaching its decision, the court noted, however, that a "zoning decision" encompasses a "continuous course" of actions leading to the ultimate zoning decision and concluded that "what the statute requires is one hearing during the continuous course of a zoning matter before the local government." *Id.* at 63.

In this case, unlike in *City of Cumming*, the zoning decision was not held to be unconstitutional by any court. Rather, the zoning decision was only a portion of the Ordinance that was considered by the Eleventh Circuit and it was only that portion of the Ordinance dealing with the licensing application that was found to be infirm. In readopting Ordinance 18-97, the City did not amend or change the text of the zoning portions of the ordinance. Thus, this is not a situation like that in *City of Cuming* in

which the process must begin anew. Accordingly, the Court finds that the City did not violate the Zoning Procedures Law when it enacted Ordinance 57-00 on September 5, 2000.

2. Whether Ordinance 18-97 was a Nullity and Could not be Readopted.

Closely related to their argument that the City failed to comply with the Zoning Procedures Law when enacting Ordinance 57-00, is Plaintiffs' argument that because Ordinance 18-97 was a "nullity" it could not be readopted by the City. Plaintiff's cite several cases in which the Georgia courts have clearly held that unconstitutional laws are void and of no force and effect. (Pls.' Reply Br. to Mot. to File 1st. Supplement Compl. at 2-3.) The Court has no dispute with these positions of law. As the Supreme Court of Georgia has noted, "The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted." *Strickland v. Newton County*, 258 S.E.2d 132, 133 (Ga. 1979). In fact, this Court has previously concluded that the entire Adult Ordinance was unenforceable against Teasers because it resulted in an unconstitutional prior restraint. (Order entered Apr. 16, 2001, at 4.)

It does not necessarily follow from these principles, however, that the City's readoption of portions of the unconstitutional Ordinance was improper, as Plaintiffs contend. There have been no findings by any court that the manner in which Ordinance 18-97 was adopted was improper, only that the Ordinance, as adopted, failed to provide a time within which protected conduct could occur. It does not appear to this Court, therefore, that the City should be prohibited from relying on those portions of the

Ordinance that were properly adopted and which have not been deemed invalid in order to create a new Ordinance which achieves the ends sought. In fact, Plaintiffs practically acknowledge as much in their brief, noting that "a nearly identical ordinance can be enacted to replace" the invalid Ordinance. (Mem. Supp. Pls.' Mot. to File 1st Supplemented Compl. at 8-9). The Court is satisfied that the City's actions of readopting Ordinance 18-97, and thereby readopting all of the findings and conclusions that led to its enactment, were proper and, therefore, the Court declines to find Ordinance 57-00 invalid on these grounds.

3. Whether the City had a Proper Evidentiary Basis for Ordinance 57-00.

Plaintiffs' third challenge to Ordinance 57-00 is closely related to both of the foregoing arguments. With this challenge, Plaintiffs contend that the City improperly relied on the evidentiary basis established in 1997 for the adoption of Ordinance 18-97 to support the adoption of Ordinance 57-00. They further argue that more recent studies that they presented to the City prior to the adoption of Ordinance 57-00 demonstrate that the evidentiary basis for the adoption of Ordinance 18-97 was no longer reasonable. In the Court's view, neither contention provides a basis for invalidating Ordinance 57-00.

The evidentiary basis for the City's decision to enact Ordinance 18-97 was specifically upheld by the Eleventh Circuit in *Artistic Entertainment*. Moreover, nothing about the manner in which the Ordinance was adopted was deemed improper. Therefore, the Court finds no error in the City's decision to rely on the same findings when readopting the Ordinance for the purpose of correcting the defects that were identified by the Eleventh Circuit.

Moreover, the fact that the City chose not to consider evidence submitted by Plaintiffs that would have offered an opinion about the effects of nudity and alcohol in Fulton County does not invalidate the process. Unlike the situation in Fulton County, as detailed in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), the City of Warner Robins did not commission the study and, therefore, had no obligation to consider it.

Moreover, even if the City considered the Fulton County study, it had no obligation to accept the results of that study in lieu of the studies previously considered and accepted. Therefore, the fact that the City may not have considered the Fulton County study, or that the City considered the study and rejected it, does not make the City's basis for its actions unreasonable. Accordingly, the Court finds that the City had an adequate evidentiary basis for its actions and the Court declines to invalidate its actions based on this ground.

4. Whether the Amendment Cures the Prior Restraint.

In moving for summary judgment, the City contends Ordinance 57-00 cures the prior restraint problem of the Adult Ordinance, as identified by the Eleventh Circuit in *Artistic Entertainment.* While Plaintiffs disagree with this contention, maintaining that Ordinance 57-00 is still a prior restraint, they have offered very little support for this contention. Instead, Plaintiffs take issue with other portions of Ordinance 57-00 and argue that

those provisions are infirm.[3] (Pls.' Mem. Supp. Resp. Def's Mot. Summ. J. at 5.)

In reviewing the newly-adopted provisions contained in Ordinance 57-00, it appears to the Court that they do, in fact, cure the prior restraint problem of the Adult Ordinance. In *Artistic Entertainment*, the Eleventh Circuit found the Adult Ordinance to be facially violative of the First Amendment because "it does not guarantee the adult business owner the right to begin expressive activities within a brief, fixed time frame." *Artistic Entm't*, 223 F.3d at 1311. As readopted, the Ordinance now requires the City to act on an application within 45 days and further provides that if no action has been taken on the application within the requisite 45-day period, then the "application shall be approved . . . and the applicant shall have the right to begin operating in the manner allowed by the license for which application was made." (Statement of Undisputed Matters of Material Fact, Ex. A at 2-3.)

With the newly-enacted language in place, an applicant for an adult business license now has the right to begin expressive activities within a 45-day period, even if the City has not acted on its application. The Eleventh Circuit has previously held that a time limit of 45 days in which the governmental body must act on a license application is a reasonable time. *Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994). The court in *Redner* cautioned,

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[3] Specifically, Plaintiffs contend § 1.045 is unconstitutional; § 1.050(a)(7)(b) and 1.050(b)(3)(b) are vague and arbitrary; and § 1.070 was enacted without the minimum standards of due process required under Georgia law. (Pls.' Mem. Supp. Resp. Def.'s Mot. Summ. J. at 5-6.)

however, that the time within which the applicant may begin expressive activities must not be illusory. *Id.* at 1500-01. No such infirmity exists here, however, as the Ordinance provides that the applicant *shall* have the right to begin operating if no action on his license has been taken. In consideration of the foregoing, therefore, the Court finds that the prior restraint problems of the Ordinance as previously enacted have been cured by the language of Ordinance 57-00. Accordingly, this Court grants the City's Motion for Summary Judgment.

III. Conclusion

In view of the foregoing, therefore, Plaintiffs' Motion for Leave of Court to File First Supplemented Complaint [Tab 71] is granted; however, Plaintiffs' request for additional discovery is denied. The Motion for Summary Judgment of Defendant City of Warner Robins [Tab 69] is granted. Furthermore, it appears to the Court that there are no issues remaining for determination by this Court, and the Clerk is hereby directed to enter final judgment for Defendants in this case.[4]

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[4] This Court previously found the Adult Business Ordinance to be constitutional and entered judgment for all Defendants to that effect. The Eleventh Circuit upheld the determination of this Court except as to this Court's conclusion that the Ordinance did not constitute a prior restraint, and reversed on that issue. At a status conference held after the Eleventh Circuit issued its decision, the parties indicated to the Court that the only issues left to be determined in this case concerned Plaintiffs' entitlement to damages and attorneys fees. On April 16, 2001, this Court entered an Order finding that Plaintiffs are not entitled to seek damages for the period in which the City enforced the Alcohol Ordinance against them. After the status conference, the City

(Continued on following page)

SO ORDERED, this the 2 day of January, 2002.

/s/ Hugh Lawson
HUGH LAWSON, JUDGE

ENTERED ON DOCKET
1/4/, 2002
Gregory J. Leonard, Clerk
/s/ [Illegible]
Deputy Clerk

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sought to raise the issue of whether Ordinance 57-00 cured the prior restraint problems of the Adult Ordinance, and that issue has been resolved in this Order. The issue of attorneys' fees can be raised by Plaintiffs after judgment is entered.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

ARTISTIC ENTERTAINMENT, INC., A Georgia Corporation d/b/a TEASERS, and STEPHEN R. DEWBERRY,	**Civil Action No. 5:97-cv-195-4(HL)**
Plaintiffs,	
v.	
THE CITY OF WARNER ROBINS, DONALD WALKER, Individually and in his capacity as Mayor of the City of Warner Robins, CHARLES HOLT, TERRY HORTON, JIMMY SELPH, DEAN COWART, GRADY CLEMONTS, and PHILIP CAMPBELL, all in their individual capacities as well as their capacities as Councilpersons for the City of Warner Robins,	
Defendants.	

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

(Filed Feb. 23, 1998)

Plaintiffs' Motion for Preliminary Injunction [Tab 9] came before the Court for hearing on December 23, 1997. After careful consideration of the evidence, arguments of counsel and relevant caselaw, the Court grants the Motion for the reasons that follow.

I. FACTUAL BACKGROUND

Plaintiff, Artistic Entertainment, Inc. d/b/a Teasers, is an adult entertainment establishment located within the City of Warner Robins, Georgia. Teasers has been in operation for a period of approximately twelve years. As a regular part of its operations, Teasers presents nude female dangers; teasers also sells alcoholic beverages for consumption on the premises. Plaintiff, Stephen R. Dewberry, is the agent on the alcoholic beverage license issued to Teasers for 1997. Defendants are the City of Warner Robins, the Mayor of Warner Robins and those persons who were members of the Warner Robins City Council on January 6, 1997.

In 1996, the City of Warner Robins had in place a procedure for those businesses wishing to obtain licenses to serve alcoholic beverages for consumption on the premises. In accordance with this procedure, licenses for consumption of alcoholic beverages on the premises were issued annually for the calendar year. A business desiring to renew such an alcoholic beverage license could apply to the City for the license during the months preceding the start of a new year. In the fall of 1996, Dewberry applied for a renewal of Teasers' license to serve alcoholic beverages for consumption on the premises. The City did not act on Teasers' renewal application during 1996.

On October 21, 1996, during a regular meeting of the Warner Robins City Council, the Council approved a moratorium on the issuance or transfer of alcoholic beverage licenses. On December 2, 1996, the City adopted a Resolution declaring a sixty-day moratorium on the issuance of licenses for the sale of alcoholic beverages for consumption on the premises. The Resolution stated that a

previously-enacted City ordinance regulating adult entertainment might not be valid and that the moratorium was being imposed for the purpose of maintaining the status quo while the City investigated "the possible secondary adverse effects" of adult entertainment establishments and considered possible revisions to its regulatory scheme relating to adult entertainment.[1]

On January 6, 1997, the Warner Robins City Council, the Houston County, Georgia, Board of Commissioners and the City Council of Perry, Georgia, conducted a joint hearing for the purpose of evaluating "the impact of adult entertainment establishments on the surrounding neighborhoods of Warner Robins, Perry and Houston County, in order to determine whether . . . to adopt local legislation concerning the location or the regulation of adult entertainment establishments." Testimony was presented at the hearing by Claire Booth, an EDA Specialist with the Middle Georgia Regional Development Center, who summarized the contents of studies from Austin, Texas, Garden Grove, California, and Fort Myers Florida.

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[1] The City's alcoholic beverage ordinance, as it existed prior to March 3, 1997, made it unlawful for establishments selling alcohol for consumption on the premises to permit any female person also on the premises to expose her breasts or to permit any person to expose his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage. The ordinance also made it unlawful for any female person to expose her breasts or for any person to expose his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage while on the premises of a commercial establishment offering alcohol for consumption on the premises. (Ch. 4, Art. I, Sec. 4-38 of Item 1, identified in the Affidavit of Carolyn J. Robbins and submitted as Defs.' exhibit 1 at the Hearing of 12/23/97.) The ordinance was not routinely enforced. (Aff. James E. Elliot, Jr. dated Dec. 23, 1997.)

Ms. Booth also testified as to the potential impact of adult entertainment on economic development and recommended that the City implement a 1,000 foot radius between adult entertainment establishments and bars and that there be a 1,000 foot radius between "these" establishments and residential areas. In conjunction with the public hearing held on January 6, 1997, City Council members were provided with copies of the studies discussed by Ms. Booth, as well as summaries from other cities on the effects of adult entertainment. City Council members were also provided with copies of testimony previously given by law enforcement officials in Macon, Georgia, Orlando, Florida, and Peach County, Georgia, concerning adult entertainment establishments in those areas.

On March 3, 1997, the City Council adopted an Ordinance Regulating Adult Businesses. In the introduction portion of the Adult Business Ordinance, the City Council stated its conclusion that nudity in conjunction with the sale and consumption of alcohol "begets criminal behavior and tends to create undesirable community conditions." The City Council further stated that in order to "prevent or reduce the adverse impacts of adult business establishments. . . . licensing and regulations are necessary for any adult business establishment." Identified within the Adult Business Ordinance is an extensive list of businesses which constitute "adult business" as defined by the Ordinance, including "[a]ny commercial establishment that provides live entertainment where any person appears nude or in such attire, costume or clothing as to expose any portion of his or her specified anatomical areas." (Ordinance Regulating Adult Business Sec. 1.010(a)(4)(b)(2)(g).) Under the Ordinance, any person

desiring to operate an adult business in the City is required to obtain an adult business license.

Also on March 3, 1997, the City Council adopted an Ordinance to Amend the Warner Robins Alcoholic Beverage Ordinance. Within the amending Ordinance, the City Council again stated its conclusion that adult entertainment in connection with the sale or consumption of alcoholic beverages has serious adverse effects on the surrounding community and, as a result, stated its intention to regulate or prohibit nudity in connection with alcohol sales or consumption. Pursuant to the terms of the Amended Ordinance, no business for which a license is required under the Adult Business Ordinance can be licensed to sell alcoholic beverages for consumption on the premises. The new provisions were made effective immediately.

After adoption of the new ordinances, by letter dated March 5, 1997, the Mayor of Warner Robins advised Dewberry of the passage of the Adult Business Ordinance and further advised him that Teasers might be required to apply for an "adult business" license. The mayor also informed Dewberry that the City Council had decided to give existing adult businesses sixty days to come in compliance with the Ordinance. In the same letter, the Mayor notified Dewberry that the moratorium on the issuance of alcoholic beverage licenses had been lifted and the application for renewal of Teasers' alcoholic beverage license had been processed.

Despite the enactment of the new Adult Business Ordinance, Teasers did not apply for an "adult business" license. At a public hearing called June 2, 1997, the City required Dewberry to appear to show cause why Teasers'

alcoholic beverage license should not be suspended or revoked for violations of the Adult Business Ordinance and the Amended Alcoholic Beverage Ordinance. At the hearing, testimony from Warner Robins police officers indicated that in May of 1997 they had purchased alcoholic beverages at Teasers, while at the same time observing nude dancing taking place. Also at the hearing, counsel for Teasers stipulated that nude dancing was taking place at Teasers in conjunction with the sale of alcoholic beverages but denied that Teasers was in violation of either the Adult Business Ordinance or the Amended Alcoholic Beverage Ordinance. The City Council voted to suspend Teasers' alcoholic beverage license for a period of ninety days.[2]

After the enactment of the Warner Robins Ordinances, but prior to the show cause hearing, Teasers and Dewberry filed the present lawsuit. The suit, which was originally filed in the Superior Court of Houston County on April 29, 1997, was brought under 42 U.S.C. § 1983; Defendants removed the case to this Court on May 6, 1997. In the Complaint, Plaintiffs claim that the amended alcoholic beverage ordinance and adult business ordinance serve to violate their First, Fifth, and Fourteenth Amendment rights. Plaintiffs' Complaint sets forth eleven counts: 1) request for declaratory judgment that the provisions of the Warner Robins City Code pertaining to alcoholic

[2] In spite of the passage of the Ordinances and the suspension of its alcoholic beverage license, Teasers has apparently continued its operations without interruption. The parties are presently working under an agreement which allows Teasers to continue to operate at least until a ruling by the Court on the Motion for Preliminary Injunction.

beverages are unconstitutional; 2) request for temporary and permanent injunctive relief; 3) request for damages for deprivation of rights; 4) claims against the City Council members for individual liability; 5) claim of defacto condemnation; 6) claim of intentional infliction of economic harm; 7) claim of ex post facto laws affecting contractual rights; 8) claim for breach of contract; 9) claim that the adult entertainment fee creates a prior restraint on conduct; 10) claims for other constitutional violations; and 11) request for attorney fees.

While the case was still in the Superior Court of Houston County, Plaintiffs pursued a Motion for Temporary Restraining Order. On May 5, 1997, Judge George Nunn heard oral argument on Plaintiffs' Motion for a TRO. Judge Nunn found that the facts presented by the Teasers situation were sufficiently similar to the facts presented in *Goldrush II v. City of Marietta*, 482 S.E.2d 347 (Ga.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 70 (1997), as to be governed by that case. Judge Nunn expressed his belief that the Warner Robins ordinance was valid and that it would have to be complied with by Teasers. Accordingly, Judge Nunn denied Teasers' request for a TRO.

On June 4, 1997, Plaintiffs filed the Motion for Temporary Restraining Order and Preliminary Injunctive Relief at issue here. Defendants responded to the Motion on July 16, 1997. No hearing was held on the Motion, however, because Plaintiffs notified the Court that they were waiting to see what the United States Supreme Court did with the *Goldrush II* case before proceeding on this case. The Supreme Court denied certiorari in *Goldrush II* on October 6, 1997. On December 19, 1997, after learning that Teasers' alcoholic beverage license would not be renewed for 1998, Plaintiffs moved for a hearing on the

Motion. In their Motion, Plaintiffs seek to have the City enjoined from enforcing the Adult Business Ordinance and the Amended Alcoholic Beverage Ordinance.

II. CONCLUSIONS OF LAW

A decision to grant or deny a request for preliminary injunctive relief is committed to the discretion of the Court. *See, e.g., Cafe 207, Inc. v. St. Johns County*, 989 F.2d 1136 (11th Cir. 1993). A party moving for preliminary injunctive relief bears the burden of establishing each of four well-established prerequisites by showing (1) the absence of any adverse effect on the public interest if the injunction issues; (2) a threatened injury that is greater than any damage the preliminary injunction would cause the opposing party; (3) an irreparable injury if the injunction does not issue; and (4) a substantial likelihood of prevailing on the merits. *See, e.g., Cafe 207*, 989 F.2d at 1137. Application of each of these elements to the facts of this case is discussed below.

A. The Absence of any Adverse Effect on the Public Interest if the Injunction Issues.

In adopting the Ordinances at issue in this case, the City Council gave as its stated reasons concerns about the undesirable secondary effects of nudity in conjunction with the sale and consumption of alcohol. Ostensibly, therefore, allowing Teasers to continue to present nude dancing while selling alcoholic beverages would have an adverse effect on the public interest in that these "secondary effects" would continue to develop. However, the validity of the City's conclusion about the undesirable secondary effects has not been determined as a matter of law and

resolution of this matter will necessarily require the Court to inquire into the City Council's stated reasons for adoption of the Ordinances. Furthermore, Teasers has been in operation in the same location in Warner Robins for more than twelve years, so allowing them to continue to operate during the pendency of this suit would not substantially alter the status quo. Accordingly, the Court finds that allowing the injunction to issue would not have an adverse effect on the public interest.

B. A Threatened Injury that is Greater than any Damage the Preliminary Injunction Would Cause the Opposing Party.

A similar conclusion is warranted with regard to the issue of whether the threatened injury to Teasers is greater than any damage the preliminary injunction would cause the City of Warner Robins. If the court were to enjoin the city from enforcing the Ordinances, Teasers would be allowed to continue the operations in which it has engaged for the past twelve years. As noted above, the ostensible injury which the City would sustain is that the "secondary effects" of nude dancing in conjunction with the serving of alcoholic beverages would be allowed to continue. However, nothing presented to the Court at this time suggests a sense of urgency in curbing the undesirable "secondary effects." On the other hand, if the Court were to decline to enjoin the City from enforcing the Ordinances, Teasers' long-standing operations would be disrupted, as it would be forced to choose to continue either its nude dancing operations – thereby risking a loss of income from having to discontinue its alcohol sales – or its alcoholic beverages operations thereby forsaking its right to engage in a protected expression. On balance,

therefore, it appears that the threatened injury to Teasers is greater than any damage that issuance of the preliminary injunction would cause the City.

C. An Irreparable Injury if the Injunction Does Not Issue.

Plaintiffs' task becomes more onerous at this point of the analysis. In support of their request for injunctive relief, Teasers argues that it will be irreparably harmed because enforcement of the Ordinances will necessarily force Teasers out of business: "An ordinance that explicitly terminates an adult business licensee's right to serve alcohol effectively terminates the entire business." (Pls.' Br. Supp. Mot. at 21.) Aside from this bare assertion however, Plaintiffs have offered the Court no evidence which supports their claim that Teasers will not be a financially feasible operation if it is forced to rely on adult entertainment only, without benefit of the income generated by the sale of alcoholic beverages. In fact, Plaintiffs' own assertions suggest that the adult entertainment offered by Teasers, alcohol sales notwithstanding, should be self-sustaining because of the "important message of eroticism" which it conveys. (Pls.' Br. Supp. Mot. at 5.)

Even if the Court were to accept Teasers argument that its business would be severely affected or terminated if it were not allowed to serve alcoholic beverages, however, the harm alleged is not irreparable. As Plaintiffs point out, Teasers has been in operation for a period of more than twelve years, the last three or four of which have been under the present management. (Dep. of James W. Berry at 9, 18.) If the Court were to deny Plaintiffs' request for injunctive relief, and if Teasers elected to

proceed as an adult business establishment only, and if Teasers was not financially successful without alcohol sales, and if it were later successful in its suit against the City, its damages could be measured monetarily, largely based on income records from previous years. As a general rule, where the harm caused by a given injury can be measured in monetary terms, the harm is not irreparable: "An injury is 'irreparable' only if it cannot be undone through monetary remedies." *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981). Accordingly, the threat of a loss of business is not sufficient to satisfy the showing of irreparable harm required to warrant injunctive relief.

In addition to their claim of economic injury, however, Plaintiffs contend that they will be irreparably harmed by the enforcement of the Ordinances because their rights under the United States Constitution and the Constitution of Georgia will be infringed. "It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Medical Center*, 661 F.2d at 338. Thus, if Plaintiffs can successfully demonstrate that their constitutional rights are threatened or impaired, a finding of irreparable injury would be mandated. *Deerfield Medical Center*, 661 F.2d at 338.

It is difficult to comprehend how Plaintiffs' First Amendment rights are being violated when Teasers will be permitted (assuming they can otherwise satisfy the licensing requirements) to continue to employ dancers who express themselves through nude dancing. The simple fact

is that the City of Warner Robins has not banned nude dancing.[3] Nevertheless, because there might be some question as to whether the Ordinances as enacted are reasonably related to the ends sought to be achieved or may otherwise have a chilling effect, or otherwise infringe on free expression, the Court cannot say that no irreparable injury can be shown, and finds that Plaintiffs have satisfied this prerequisite.

D. A Substantial Likelihood of Prevailing on the Merits.

In addition to satisfying the above-noted prerequisites, in order to succeed on their Motion for Preliminary Injunction, Plaintiffs must also demonstrate to the Court that they have a substantial likelihood of prevailing on the merits of their Complaint. In their Complaint, in their Brief to the Court, and in oral argument, Plaintiffs have presented a number of challenges to the validity of the disputed Ordinances and the Court will not attempt to address the merits of each of them here. Only Plaintiffs' claim that the Ordinances infringe on their rights of free expression warrants extensive discussion.

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[3] Compare the Ordinances at issue in this case with those enacted by St. Johns County, Florida, as detailed in *Cafe 207, Inc. v. St. Johns County,* 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd* 66 F.3d 272 (1995), *cert. denied* ___ U.S. ___, 116 S. Ct. 1544 (1996). In *Cafe 207*, the United States District Court for the Middle District of Florida upheld as constitutional a county ordinance banning nudity in public places. The ordinances affected the Cafe Erotica, a restaurant which provided nude dancing in conjunction with the sale of food, but in which no alcoholic beverages were served.

1. Infringement on Right of Free Expression

Nude dancing is afforded some protection under the First Amendment, though not to the same degree as other First Amendment activities: "[N]ude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566 (1991). *See also Young v. American Mini Theatres,* 427 U.S. 50, 70 (1976) (society's interest in protecting erotic expression is of a lesser magnitude than its interest in untrammeled political debate). Although nude dancing is protected expressive conduct, governmental bodies can, within certain limitations, enact statutes or zoning ordinances which regulate such protected activities. Thus, in *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), the United States Supreme Court held that a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of residential property, churches, parks, or schools did not violate the First Amendment. Similarly, in *Barnes* the Supreme Court held that Indiana's public indecency law, which served to prohibit nude dancing performed as entertainment, did not violate the First Amendment. Likewise, the United States Court of Appeals for the Eleventh Circuit has upheld ordinances which restrict the locations of adult business establishments, *see, e.g., International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157 (11th Cir. 1991), and which prohibit nudity in public places. *See, e.g., Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995), *aff'g Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994), *cert. denied,* ___ U.S. ___, 116 S. Ct. 1544 (1966).

While recognizing that governments have some authority to restrict otherwise protected activities, the courts have demonstrated some inconsistencies in the methods employed in determining the validity of such regulations. In *Renton*, the Supreme Court concluded that because the ordinance at issue did not ban adult theaters entirely, but only controlled where they could be located, the ordinance was properly analyzed as a form of time, place, and manner regulation. The Court further found the ordinance to be content-neutral because it was "aimed not at the *content* of the films shown . . . but at the *secondary effects* of such theaters on the surrounding community." *Renton* 475 U.S. at 46-47. The Court in *Renton* concluded that "[t]he appropriate inquiry . . . is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50.

Unlike in *Renton*, however, in *Barnes*, a plurality of the Court considered the constitutionality of the challenged ordinance under the four-part test first set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). Although the plurality noted that the "time, place, or manner test . . . has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*," it nevertheless chose to consider Indiana's ban on public nudity under *O'Brien*. Under the *O'Brien* test, a government regulation which places incidental limitations on expressive conduct is sufficiently justified if [1] it is within the constitutional power of the Government; [2] it furthers an important or substantial governmental interest; [3] the governmental interest is unrelated to the suppression of free expression; and [4] the incidental restriction on alleged First Amendment freedoms is no greater than is

essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 376-77.

In *Barnes*, the plurality found that all of the *O'Brien* elements were satisfied, but concluded that the ordinance furthered an important governmental interest because it served to protect order and morality. *Barnes*, 501 U.S. at 569. Justice Souter, however, who concurred in the judgment, approved the four-part *O'Brien* inquiry as the "appropriate analysis" but, on the basis of the decision in *Renton*, concluded that the State of Indiana's interest in preventing the secondary effects of adult entertainment satisfied the governmental interest even though not specifically identified by the State as its motivation for the enactment of the challenged ordinance. *Barnes*, 501 U.S. at 582-85 (Souter, J., concurring).

In 1991, the Eleventh Circuit had occasion to sort through the various tests applied in *Renton* and *Barnes*. In *International Eateries* the Eleventh Circuit considered the validity of county ordinances which restricted adult nightclubs to certain identified locations. In upholding the ordinances, the court applied the two-part inquiry delineated in *Renton*. The Eleventh Circuit also concluded that *Renton* imposed an added inquiry: whether the challenged ordinances were narrowly tailored to further the government interest. *Int'l Eateries*, 941 F.2d at 1162. In *International Eateries*, the court elected to analyze the distance ordinance under the *Renton* test because the challenged ordinance more closely resembled the ordinance in *Renton* than the statute in *Barnes*. *Int'l Eateries*, 941 F.2d at 1161-62 & n.2. The court noted, however, that whether applying the enhanced *Renton* test or the *O'Brien* test, the result should be the same. *Int'l Eateries*, 941 F.2d at 1161-62 & n.2.

Despite the Eleventh Circuit's analysis in *International Eateries*, the question of what test to apply in determining the validity of regulations impacting on First Amendment rights, remains unclear. The Eleventh Circuit recently affirmed a judgment of the United States District Court for the Middle District of Florida in which the district court applied the *O'Brien* test. *Cafe 207, Inc. v. St. Johns County,* 66 F.3d 272 (11th Cir. 1995), *aff'g Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994), *cert. denied,* ___ U.S. ___, 116 S. Ct. 1544 (1996). At issue in *Cafe 207* was an ordinance which prohibited nudity in public places. *See also J & B Social Club v. City of Mobile*, 966 F. Supp. 1131 (S.D. Ala. 1996) (applying *O'Brien* test to ordinance banning topless dancing in clubs selling alcohol). Because the Ordinances at issue here more closely resemble those at issue in *Cafe 207* and *J&B Social Club*, the Court will apply the four-part *O'Brien* test. Furthermore, because the Court finds that the Ordinances fail the second prong of the test, in that they do not further the governmental interest, only one element of the test will be discussed here.

In this case, the City gave as its stated reasons for the enactment of the challenged Ordinances the desire to protect the City from the undesirable conditions and adverse effects stemming from the conjunction of nudity and the consumption of alcohol. It is now well-established that "a city's interest in protecting the quality of urban life from the secondary effects of adult businesses is indeed substantial." *Int'l Eateries*, 941 F.2d at 1162. Thus the City's stated intention of protecting against the secondary effects of adult businesses is legitimate. However, "the enacting body must have a reasonable basis for its belief that the harm to be protected against in fact exists," *Int'l*

Eateries, 941 F.2d at 1162, and the proposed remedy must further the governing body's stated role of protecting against that harm.

As a general rule, a city need not conduct its own studies in order to determine whether the harm to be protected against in fact exists. *Int'l Eateries*, 941 F.2d at 1162. In enacting the Ordinances at issue here, the City referenced numerous reports and studies showing a correlation between adult entertainment and increased crime and decreased property values. The application of these studies to the City of Warner Robins is of limited value, however, because the City has offered very little information which demonstrates how the problems and proposed solutions for cities like Garden Grove, California, or Fort Meyers, Florida, translate into solutions for the City of Warner Robins, particularly where the "problem" in Warner Robins is one adult entertainment nightclub, while the problems addressed in the studies from the other cities deal with the effects of several establishments contained within larger areas and consisting of several different types of adult entertainment.

More significantly, however, very little of the material presented in these studies actually addresses the combined effects of consumption of alcohol and adult entertainment, so there is very little evidence which supports the enactment of an Ordinance which serves to separate the two activities. The City has cited the Court to only two studies which even attempt to address the effects of adult entertainment in conjunction with alcohol sales (transcript of hearing at 66-67), and the Court's review of the materials

relied on by the City Council reveals no others.[4] Specifically, the Garden Grove study concluded that there was an "interactive effect" between taverns and adult business establishments and recommended that taverns and adult business establishments be separated by a distance of 1,000 feet. (Garden Grove study at 5.) This conclusion was based on a showing of a higher number of personal crimes in areas served by both taverns and adult entertainment establishments, as opposed to areas served by taverns only. (Garden Grove study at 30-32.) Additionally, testimony presented at a public hearing in Fort Meyers, Florida, on November 22, 1993, concluded that the number of police service calls made during a one-year period were 63 percent higher at adult entertainment clubs than at other businesses serving alcohol. (Fort Meyers, Florida, Public Hearing at 4-5.)

Contrasted with the results of these studies from other cities, however, is the testimony of the Warner Robins City Council members, many of whom denied any knowledge of any particular crime problems at Teasers.

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[4] By affidavit presented December 23, 1997, the City submitted a letter from the Chief of Police for the City of Warner Robins dated January 13, 1997, in which he stated that Teasers had 47 service calls during 1996 as compared with three unidentified "lounges" which had 13, 14, and 29 service calls for 1996. These numbers are inconclusive, however, as they fail to offer enough information on which an accurate assessment can be made. For example, because these "lounges" are unidentified, the Court cannot determine whether, except for the fact that they do not offer adult entertainment, they are in other respects sufficiently similar to Teasers to justify comparisons. Furthermore, the fact that three unidentified "lounges" had fewer calls than Teasers does not foreclose on the possibility that there are other "lounges" which were not considered by the Chief of Police but whose service calls were closer to Teasers in number.

(Dep. J. Selph at 5, 7; Dep. D. Cowart at 21; Dep. G. Clemonts at 4-6.) One City Council member acknowledged that he was not so much concerned with crime in the area of Teasers as he was concerned with satisfying the general public by getting Teasers closed down. (Dep. P. Cambell at 5.) Furthermore, in testimony given after the City Council voted on the Ordinances, Warner Robins police officers testified that they were not aware of any particularized problems with drugs or prostitution in the area of Teasers. (Hearing of June 2, 1997 at 11, 14, 18-20.)

In sum, the evidence in the record pertaining to the likelihood of increased crime where alcohol and adult entertainment are combined is scant. The results of the studies from other cities which were relied upon by Warner Robins are not sufficiently similar to the situation presented in Warner Robins to support the actions taken by the City, particularly in light of testimony which suggests that the sale of alcohol at Teasers, in conjunction with nude dancing, has not led to a demonstrable increase in crime. In the absence of sufficient evidence of a correlation between nude dancing, alcohol consumption and crime in the area of Teasers, it cannot be said that the Ordinances further the government's interest in protecting the City from the undesirable conditions and adverse effects stemming from the conjunction of nudity and the consumption of alcohol.

The Court recognizes that the weight of the case law suggests that challenges as to "evidence about secondary effects or, rather, the lack of them, is . . . clearly foreclosed." *Cafe 207*, 856 F. Supp. at 645. *See also J & B Social Club v. City of Mobile*, 966 F. Supp. 1131 (S.D. Ala. 1996). Furthermore, the Court recognizes that the cases which hold that cities need not conduct their own studies

in order to determine whether a harm exists do not appear to distinguish between cities which have never had adult entertainment, and thus have no data of their own from which to draw conclusions, and cities which have had adult entertainment in existence for a number of years and thus could determine the actual harm presented by adult entertainment within their own city. Nevertheless, the Court is persuaded that it is not obliged to ignore evidence which casts doubt on the reasonableness of the City's conclusions that the Ordinances will further its interest in protecting the quality of urban life. Nor does evidence of secondary effects found in other cities foreclose on on this court's right to inquire as to the relevance of these findings in relation to the City of Warner Robins. In considering all of the evidence before the Court at this time, the Court is of the opinion that the City of Warner Robins does not "have a reasonable basis for its belief that the harm to be protected against in fact exists." *Int'l Eateries*, 941 F.2d at 1162. Accordingly, it cannot be said that the Ordinances at issue here further the government's interest in protecting the City from the adverse effects of nudity and alcohol consumption.

In view of the foregoing, the Court finds that the Ordinances fail to satisfy a necessary prong of the *O'Brien* test. Thus, the Court need not consider the remaining elements of the *O'Brien* analysis. Furthermore, the Court finds that Plaintiffs have demonstrated a likelihood of success on the merits of their claim that their rights of free expression are being impinged. Insofar as their request for an injunction is based on this claim, the Motion for Preliminary Injunction is granted.

2. Other Issues

Plaintiffs have presented several other challenges to the validity of the Ordinances, such as their arguments that the Ordinances unconstitutionally impair their contract obligations; that the City erroneously asserted the Twenty-first Amendment as a means by which to limit Plaintiffs' right of free expression; that the Ordinances do not properly provide for judicial review; and that the Ordinance regulating adult businesses is unconstitutionally vague. In view of the Court's decision that Plaintiffs have demonstrated a likelihood of success on the merits of their claim that their rights of free expression are being impinged, it will not be necessary for the Court to consider the merits of each of these claims.

III. CONCLUSION

In view of all of the foregoing, the court finds that Plaintiffs have satisfied the prerequisites necessary for the granting of injunctive relief. Accordingly, Plaintiffs' Motion for Preliminary Injunction is hereby **GRANTED**. Until otherwise directed by the Court, Defendants are hereby enjoined from enforcing the Adult Business Ordinance and the Alcoholic Beverage Ordinance, as amended March 3, 1997, against Teasers.

SO ORDERED, this the 23 day of February, 1998.

/s/ Hugh Lawson
HUGH LAWSON,
JUDGE
UNITED STATES
DISTRICT COURT

mls

ENTERED ON DOCKET
Feb 23, 1998
Gregory J. Leonard, Clerk
/s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-10216-FF

ARTISTIC ENTERTAINMENT, INC.,
a Georgia Corporation d.b.a. Teasers,
STEPHEN R. DEWBERRY,

Plaintiffs-Appellants

versus

CITY OF WARNER ROBINS,
DONALD WALKER, Individually and in his capacity as Mayor of the City of Warner Robins, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

(Filed Oct. 29, 2003)

Before: EDMONDSON, Chief Judge, WILSON, Circuit Judge, and NELSON*, District Judge.

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* Honorable Edwin L. Nelson, United States District Judge for the Northern District of Alabama, sitting by designation. This case is being

(Continued on following page)

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
CHIEF JUDGE

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decided by a quorum due to the death of Judge Nelson on 17 May 2003. See 28 U.S.C. § 46(d).

(2)

No. 03-1089

Supreme Court, U.S.
FILED
MAR 15 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ARTISTIC ENTERTAINMENT, INC., et al.,

Petitioners,

vs.

CITY OF WARNER ROBINS, GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONSTITUTION, STATUTES AND REGULATIONS

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STATEMENT OF THE CASE

Petitioner, Artistic Entertainment, Inc., d/b/a Teasers, is an adult entertainment establishment located in Warner Robins, Georgia, that offers nude dancing and sells alcoholic beverages for consumption on the premises. (R1-1-Ex. A-1-2).[1] On January 6, 1997, the City conducted a hearing to examine and evaluate the impact of adult entertainment establishments on the surrounding neighborhoods of the cities of Warner Robins and Perry and Houston County, Georgia "in order to determine whether in the interests of health, safety and welfare of the citizens of these three political bodies, it is necessary or desirable to adopt local legislation concerning the location or the regulation of adult entertainment establishments." (Ex. 27-34, Defs' Ex. 2 thereto, p. 5). In advance of the hearing, the City Council members were provided with certain written materials and studies for their examination. (*Id.* at 5-6; R1-25-Defs' Ex. A). Following the hearing, and before enactment of the Ordinances, the City Council received an affidavit from Warner Robins Police Chief Dan Hart showing that a higher number of service calls was made by his Department to Petitioner's place of business during the year 1996 than to three other lounges that also sold alcoholic beverages but did not offer nude dancing. (R1-21-Defs' Ex. 2, Ex. A; R1-25-Ex. B).

Subsequent to the evidentiary hearing, on March 3, 1997, the City enacted an Ordinance Regulating Adult Businesses, Ordinance 18-97. (R1-21-Defs' Ex. 1, item 3)

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[1] Citations to the record reflect volume numbers and docket entries as set forth in the Record Index before the Eleventh Circuit Court of Appeals.

(hereinafter the "Adult Ordinance"). On March 3, 1997, the City also enacted Ordinance 19-97, which amended its alcoholic beverage ordinance. (R1-21-Defs' Ex. 1, item 2) (hereinafter the "Alcohol Ordinance"). The Adult Ordinance contains a severability clause which states that "If any section, subsection, subdivision, paragraph, sentence, clause or phrase in this ordinance, or the application thereof to any circumstances, is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this ordinance." (R1-21-Defs' Ex. 1, item 3, section 1.170).

This case made three trips to the Eleventh Circuit Court of Appeals. In the first appeal, in an unpublished opinion, the Eleventh Circuit vacated the District Court's Order enjoining enforcement of the ordinances, "finding that [the District Court] had not accorded sufficient weight to the evidentiary basis that supported adoption of the ordinances." *Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1999 (11th Cir. 2003) (summarizing prior unpublished opinion). Upon remand of the case to the district court, the parties engaged in extensive discovery. Petitioner served interrogatories and requests for admissions and for production of documents. The parties conducted 10 depositions. (R2-76-3). In the second appeal, the Eleventh Circuit concluded that the challenged ordinances were subject to intermediate scrutiny, and that the Respondent had an adequate basis for concluding that a proscription on the sale and consumption of alcohol at adult businesses would reduce crime and other social costs associated with those businesses. *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1308-10 (11th Cir. 2000). However, the Eleventh Circuit concluded the

Adult Ordinance operated as a prior restraint on protected speech "because it did not provide for an applicant's unconditional right to begin operating his business if the City failed to act on his application for a license within the time required." *Artistic*, 223 F.3d at 1310-11.

On September 5, 2000, the Warner Robins City Council enacted An Ordinance to Amend the Ordinance Regulating Adult Businesses No. 57-00. (R2-73, Ex. A) (hereinafter the "Amending Ordinance"). The Amending Ordinance provides, in part, as follows:

> If the City Council has not approved or disapproved an application for a license within forty-five (45) days from the date such application was received by the City Clerk, then on the expiration of the forty-fifth (45th) day: (1) the application shall be approved and the City Clerk shall immediately issue the license for which application was made, and (2) the applicant shall have the right to begin operating in the manner allowed by the license for which application was made.

(R2-73, Ex. A).

The District Court held a status conference on April 3, 2001, at which it requested the parties submit letter briefs on the remaining issues in the case. (R2-65). On April 16, 2001, the District Court ruled that the parties had thirty days within which to file motions concerning whether or not the Amending Ordinance cured the prior restraint problem. (R2-68-5). Respondent filed a motion for summary judgment on May 15, 2001, arguing that the Amending Ordinance had cured the prior restraint problem. (R2-70). Petitioner filed a motion seeking to supplement its original complaint and launch a new period of discovery. (R2-72). Respondent did not oppose Petitioner's motion to

file a supplemental complaint, to the extent that was necessary to formally put at issue the question whether the Amending Ordinance cured the prior restraint problem with the Adult Ordinance. (R2-75). Respondent opposed additional discovery, however, because the issues could be decided on the record. (R2-76). The Eleventh Circuit's third decision in this case best summarizes the proceedings as follows:

> In the context or these pending motions, . . . the district court granted Artistic's motion to file an amended complaint but, finding the Amending Ordinance was valid, also granted the City's motion for summary judgment. Finding that additional discovery would not be helpful, the district court denied Artistic's request to reopen discovery.

Artistic, 331 F.3d 1200-01 (Pet. App. pp. 4-5).

REASONS FOR DENYING THE WRIT

Petitioner has phrased the first question presented as follows: "When the federal judiciary declares a law facially invalid, does any portion of that law remain valid for purposes of suppressing free speech?" Neither the Eleventh Circuit's ruling in *Artistic Entertainment, Inc., et al., v. City of Warner Robins*, 331 F.3d 1196 (11th Cir. 2003) nor the record below, raises the question presented by the Petition. Contrary to the characterization posed by the first question presented, the Eleventh Circuit concluded that "no part of the Adult Ordinance survived our decision in Artistic Entertainment [223 F.3d 1306], because the entire ordinance is dependent upon a valid licensing regime." *Artistic*, 331 F.3d at 1204 (Pet. App. p. 13). The

Eleventh Circuit continued, stating that "the Amending Ordinance [Ordinance 57-00, Petition, pp. 2-5] is valid only if it stands as an entirely 'new' ordinance." *Artistic*, 331 F.3d at 1204 (Pet. App. p. 13). Clearly, the Eleventh Circuit's decision in *Artistic* does not raise the question presented, as framed by Petitioner.

Citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2001), Petitioner argues that it was "deprived of an opportunity to challenge the factual predicate supporting the Amending Ordinance in accordance with *Alameda Books*." (Pet. p. 14). Petitioner asserts that "Artistic submitted evidence which made the inference appear unreasonable that nude dancing in taverns creates adverse secondary effects." (Pet. p. 14). Petitioner then misstates the factual record by stating that "[t]he City did not rebut Artistic's evidence, except to provide the deposition testimony of the Garden Grove study's authors, who candidly disavowed any basis in their study for believing that nudity and alcohol generated adverse secondary effects." (Pet. p. 14). One of the studies relied on by the City when enacting the Adult Ordinance was the "Final Report to the City of Garden Grove: The Relationship Between Crime and Adult Business Operations on Garden Grove Boulevard" authored by Professors Richard McCleary and James W. Meeker. (Ex. 50, Pl. Ex. B; Meeker Depo., Pl. Ex. B) (hereinafter the "Garden Grove study"). Contrary to the representations of Petitioners, Professors Meeker and McCleary were unequivocal in their depositions that there is a strong correlation between adult entertainment and negative secondary effects, such as increased crime, decreased property values, and decrease in quality of life, (Ex. 50-33, Meeker Depo. p. 33; Ex. 51-46-49, McCleary Depo. pp. 46-49), and both were unequivocal that the sale

or consumption of alcohol in conjunction with adult entertainment would only exacerbate those negative secondary effects. (Ex. 51-46-49; McCleary Depo. pp. 46-49; Ex. 50-14-15, Meeker Depo. pp. 14-15). Professors Meeker and McCleary also expressed their expert opinion that the Garden Grove was relevant to the question of whether or not adult entertainment establishments are associated with an increase in negative secondary effects, even if one accepts the proposition that Teasers does not generate any increase in crime. (Ex. 50-29-30, Meeker Depo. pp. 29-30; Ex. 51-46-49, McCleary Depo. pp. 46-49). Other than rhetoric, and a misrepresentation of the factual record, Petitioner does not show how the Eleventh Circuit's decision in *Artistic* "decides an important federal question in a way that conflicts with relevant decisions of this Court." (Rule 10(c)).

The Eleventh Circuit in *Artistic* concluded that the City was entitled to rely on the original evidentiary support for the Adult Ordinance when it readopted the Amending Ordinance. *Artistic*, 331 F.3d at 1205 (Pet. App. pp. 15-16). The Court stated that "the City adopted an ordinance almost identical to the original Adult Ordinance, making a slight adjustment designed and intended to correct the prior restraint problem found by this court. We cannot say that in enacting the Amending Ordinance the City's reliance on its own evidentiary basis compiled in support of the Adult Ordinance, which we specifically found adequate, was 'unreasonable.'" *Id.* (Pet. App. pp. 15-16). The Eleventh Circuit's decision is not in conflict with *Alameda*. This Court has stated that "we must grant certiorari only in those cases that will enable us to resolve particularly important questions," *Yee v. City of Escondido*,

502 U.S. 519, 536 (1992), and a grant of certiorari in this case will not further that goal.

Petitioner framed the second question presented as follows: "In a first amendment case, can the district court *sua sponte* grant summary judgment against proposed supplemental claims without first providing notice to the party proposing these claims?" (Pet. p. 1). Petitioner has framed the question presented in a manner that misstates the proceedings below. The Eleventh Circuit's opinion in *Artistic* makes clear that in the context of the underlying litigation, "Artistic had sufficient notice that the court might rule on the supplemented claims." *Artistic*, 331 F.3d at 1203 (Pet. App. p. 9). Indeed, the District Court notified the parties that they had thirty days to present motions related to the issue whether or not the prior restraint problems with the Adult Ordinance had been cured. (R2-68; April 16, 2001 Order). The Eleventh Circuit's conclusion in *Artistic* that "summary judgment is entirely appropriate even if no formal notice has been provided" when the legal issue has been fully developed and the evidentiary record is complete, *Artistic*, 331 F.3d at 1202 (Pet. App. pp. 7-8), is not such a departure from the accepted and usual course of judicial proceedings so as to warrant review by this Court. *Cf.* Rule 10(a). In essence, by partially granting Petitioner's Motion to Supplement the Complaint, the District Court simply amended the pleadings to conform to the evidence at the time the City filed its Motion for Summary Judgment. *Cf. Putnam v. Williams*, 652 F.2d 497, 499 (5th Cir. Unit B Aug. 1981) ("in considering a motion for summary judgment, the pleadings may be treated as though they had been amended to conform to the evidence filed with the motion when not objected to by the opposite party").

Petitioner also argues that the Eleventh Circuit's decision in *Artistic* decides an important federal question in a way that is in conflict with a decision of the Georgia Supreme Court. (Petition, p. 16). Petitioner fails to identify a single decision of the Georgia Supreme Court that is in conflict with the decision of the Eleventh Circuit in *Artistic*. In contrast to the sensational rhetoric in the Petition, the Eleventh Circuit clearly stated that the Amending Ordinance "is valid only if it stands as an entirely 'new' ordinance." *Artistic*, 331 F.3d at 1204 (Pet. App. p. 13). The Court noted that the evidentiary basis for the Adult Ordinance had been found adequate in its previous decision, *Artistic*, 331 F.3d at 1205 (Pet. App. 15) (citing *Artistic Entertainment v. City of Warner Robins*, 223 F.3d 1306, 1309 (11th Cir. 2000)), and it concluded that the Respondent reasonably could rely on the original evidentiary support for the Adult Ordinance when enacting the Amending Ordinance. *Artistic*, 331 F.3d at 1205 (Pet. App. p. 16). The Eleventh Circuit also held that the Alcohol Ordinance appropriately incorporated by reference the definitions of "specified anatomical areas" and "specified sexual activity" set forth in the Adult Ordinance. *Artistic*, 331 F.3d at 1206-07 (Pet. App. pp. 16-19).

The Eleventh Circuit stated that "[w]e are aware of no authority to the effect that a definition incorporated by reference into another otherwise valid ordinance (for example, the Alcohol Ordinance) ceases to be an operative definition just because it derives from a referenced ordinance (for example, the Adult Ordinance) that was declared unconstitutional for reasons having nothing to do with the definition." *Artistic*, 331 F.3d at 1206 (Pet. App. pp. 17-18). Neither in proceedings before the Eleventh Circuit nor in the Petition before this Court, has the

Petitioner set forth any controlling authority that the procedure employed by Respondent of incorporating certain definitions by reference was constitutionally infirm, or that the decision of the Eleventh Circuit is in conflict with a decision of the Georgia Supreme Court.

CONCLUSION

The decision of the Eleventh Circuit is not in conflict with decisions of other United States courts of appeal, the Georgia Supreme Court, or decisions of this Court. At best, Petitioner is simply complaining that the Eleventh Circuit misapplied a properly stated rule of law. Petitioner has not set forth compelling reasons for granting a writ of certiorari. Granting certiorari in this case will not further the Court's goals of granting certiorari "only in those cases that will enable us to resolve particularly important questions." *Yee*, 503 U.S. at 536. Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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